535

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 231. 94.

THE SARANAC LAND AND TIMBER COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES A. ROBERTS, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED JUNE 20, 1896.

(16,916.)

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JAMES A. ROBERTS, AS COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 2, 1898.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the northern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The Saranac Land and Timber Company, plaintiff, and James A. Roberts, as comptroller of the State of New York, a manifest error hath happened, to the great damage of the said The Saranac Land and Timber Company, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 23 day of June, 1898, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Seal of the U. S. Circuit Court, Northern District N. Y.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24 day of May, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States of America for the Northern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

ALFRED C. COXE, *U. S. J.*

2 [Endorsed:] 3110. Supreme Court of the United States. The Saranac Land and Timber Company, plaintiff in error, *vs.* James A. Roberts, as comptroller, &c., defendant in error. Writ of error. Weeds, Smith & Conway, attorneys for plaintiff in error, Plattsburgh, N. Y. Due service of a copy of the within writ of error is hereby admitted this — day of ——, 189–. —— ——, attorney for defendant in error. U. S. circuit court, N. D. of N. Y. Filed May 24, 1898. W. S. Doolittle, clerk. D. C. N.

UNITED STATES OF AMERICA, *Northern District of New York,* } ss:

I, W. S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 71, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The Saranac Land and Timber Company, plaintiff in error, against James A. Roberts, as comptroller of the State of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this eleventh day of June, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

Seal of the U. S. Circuit Court, Northern District N. Y.

W. S. DOOLITTLE, *Clerk.*

3 Circuit Court of the United States for the Northern District of New York.

THE SARANAC LAND AND TIMBER IMPROVEMENT Company *against* JAMES A. ROBERTS, as Comptroller of the State of New York. } Complaint. N. W. ¼, T. 24.

The plaintiff above named, by Weeds, Smith & Conway, its attorneys, complains of the defendant and alleges on information and belief:

I. That it is a foreign corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and is a citizen and resident of said State.

II. That the defendant is the comptroller of the State of New York and is a citizen of the State of New York and a resident of the northern district thereof.

III. That plaintiff is seized in fee-simple and entitled to the possession of the following-described lands—that is to say: All that tract of land situate in the northern district of the State of New York, in the county of Franklin and town of Harriettstown, known as and being the northwest quarter of township number
4 twenty-four (24), in Great lot one (1), of Macomb's purchase, containing seven thousand five hundred acres, more or less, and the same being wild, vacant, or forest land.

IV. That defendant, as comptroller of the State of New York, is now in the actual possession of said lands and unlawfully withholds possession of the same from the plaintiff.

Wherefore the plaintiff demands judgment:

1. For the possession of the said premises.

2. For twenty-five hundred dollars, the damages sustained by plaintiff by the withholding of the same.

3. For the costs and expenses of this action.

WEEDS, SMITH & COMPANY,
Attorneys for Plaintiff, Plattsburgh, New York.

STATE OF NEW YORK,
Southern District of New York, City and County of New York, } ss:

Frank Walling, being duly sworn, says that he is an officer and the president of The Saranac Land and Timber Company, the plaintiff above named; that he has read the foregoing complaint and knows the content- thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FRANK WALLING.

Sworn to before me this 23d day of Jan'y, 1895.

[L. S.]

THOMAS TIERNEY,
Notary Public, Kings Co., N. Y.

Ctf. filed in N. Y. Co.

Indorsed: Complaint. Filed Jan. 25, 1895. W. S. Doolittle, clerk.

5 Circuit Court of the United States for the Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY
against
JAMES A. ROBERTS, as Comptroller of the State of New York.

To William S. Doolittle, Esq., clerk of the United States court for the northern district of New York:

You will please enter my appearance for the defendant, James A. Roberts, comptroller of the State of New York, in the above-entitled suit.

Dated, Albany, February 14th, 1895.

T. S. HANCOCK,
Attorney General of the State of New York, Solicitor and of Counsel for Def't, James A. Roberts, as Comptroller of the State of New York.

Indorsed: Notice of appearance. Filed Mar. 9, 1895. W. S. Doolittle, clerk.

6 *Demurrer.*

Circuit Court of the United States for the Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY
against
JAMES A. ROBERTS, as Comptroller of the State of New York.

The demurrer of the above-named defendant, James A. Roberts, as comptroller of the State of New York, to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things contained in said bill of complaint to be true in such manner and form as the same herein set forth are alleged, demurs to said bill, and for causes of demurrer showeth:

First. That it appeareth by the plaintiff's own showing by said bill that he is not entitled to the relief demanded by the said bill against this defendant.

Second. That it appears by said bill that the court has no jurisdiction of the defendant, James A. Roberts, as comptroller of the State of New York, nor of the State of New York, who, by James A. Roberts, as comptroller, is the real party whose interests are affected by said suit.

7 Wherefore, and for divers other good causes of demurrer appearing on said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to said bill, and humbly prays to be hence dismissed with reasonable costs in this behalf.

Dated March 8th, 1895.

T. E. HANCOCK,
Attorney General of the State of New York, Solicitor and of Counsel for Defendant, James A. Roberts, as Comptroller of the State of New York.

Office and post-office address, Capitol, Albany, N. Y.

STATE OF NEW YORK,
City and County of Albany, Northern District of New York, } *ss:*

Willis E. Merriman, being duly sworn, doth depose and say that I am the 2nd deputy comptroller of the State of New York; that the foregoing demurrer is not interposed for delay.

WILLIS E. MERRIMAN.

Sworn to before me this 8th day of March, 1895.

JOHN J. HART,
Notary Public, Rens. Co.

Certificate filed in Albany Co.

Indorsed: Demurrer. Filed Mar. 9, 1895. W. S. Doolittle, clerk.

8 *Order.*

At a special term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the U. S. court-house, in the city of Utica, on the 28th day of June, A. D. 1895.

Present: The Honorable Alfred C. Coxe, judge.

THE SARANAC LAND AND TIMBER COMPANY
v.
JAMES A. ROBERTS, as Comptroller of the State of New York.

The defendant having demurred to the complaint herein and the same having come on for argument at a stated term of this court, held at the village of Canandaigua, on the 18th day of June, 1895, after hearing Mr. G. D. B. Hasbrouck, deputy attorney general of the State of New York, in favor of said demurrer, and Mr. Frank Smith, opposed, it is—

Ordered that the demurrer be, and it is hereby, overruled. The defendant may have thirty days from the date of the service of a copy of this order in which to answer said complaint.

ALFRED C. COXE, *U. S. J.*

Indorsed: Order. Filed Jun- 28, 1895. W. S. Doolittle, clerk.

9 Circuit Court of the United States for the Northern District of New York.

THE SARANAC LAND & TIMBER COMPANY, Plaintiff,
vs.
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant.

No. 3110. N. W. ¼, Twp. 24.
Amended Answer.

The defendant, James A. Roberts, the comptroller of the State of New York, by Theodore E. Hancock, attorney general of the State of New York, his attorney, answering the complaint of the plaintiff, by this his amended answer:

I.

Admits that the said James A. Roberts is the comptroller of the State of New York, and that he is a citizen of the State of New York and a resident of the northern district of New York, but said defendant denies each and every allegation of the complaint not herein expressly admitted.

II.

For a further and separate defense, this defendant alleges upon information and belief that the people of the State of New York are the owners in fee of all the lands described in the complaint, and are and have been at all times for more than two years last past

lawfully in the actual possession thereof by virtue of a cer-
10 tain certificate or certificates of tax sales duly made and executed by the comptroller of the State of New York on or about the 12th day of October, 1877, to the people of the State of New York in pursuance of certain tax sales made by said comptroller, at Albany, in said State, on or about the day last above mentioned, for the non-payment of non-resident taxes which had been duly assessed and levied upon the said lands described in said complaint, which said certificate or said certificates were outstanding and had remained in force for two years after the last day allowed by law to redeem from such sales, in conformity with the provisions of the statutes of the State of New York and by virtue of a certain conveyance duly executed to the people of the State of New York, the purchasers at the hereinbefore-mentioned tax sales, at the expiration of the two years allowed by law for redemption (within which time no person had redeemed the same), by James W. Wadsworth, comptroller of the State of New York, on or about the 9th day of June, 1881, which said conveyance was duly recorded in the office of the clerk of said county of Franklin on the 8th day of June, 1882, in Liber 68 of Deeds, at page 148, &c.; that each and every of said proceedings were in due form of law and in pursuance of the statutes of the State of New York regulating the sale of lands for unpaid taxes.

III.

For a further and separate defence this defendant alleges upon information and belief that the people of the State of New
11 York are the owners in fee of all the lands described in the complaint, and are and have been at all times for more than two years last past lawfully in the actual possession thereof by virtue of certain other certificates of tax sales duly made and executed by the comptroller on or about the 15th day of November, 1881, to the people of the State of New York, in pursuance of certain tax sales made by said comptroller, at Albany aforesaid, on or about the day last above mentioned, for the non-payment of non-resident taxes, which had been duly assessed and levied upon the lands described in said complaint, which said certificates were outstanding and had remained in force for two years after the last day allowed by law to redeem from such sales, in conformity with the provisions of the statutes of the State of New York and by virtue of a certain other conveyance duly executed to the people of the State of New York, the purchaser- at said last-mentioned sales, at the expiration of the two years allowed by law for redemption (within which time no person had redeemed the same), by Alfred C. Chapin, as the comptroller of the State of New York, on or about the 31st day of October, 1884, which said conveyance was duly recorded in the office of said county of Franklin on March 5, 1887, in Liber 79 of Deeds, at page 265, &c., in conformity with said acts of said legislature; that each and every of said proceedings were in due form of law and in pursuance of the statutes of the State of New York regulating the sale of lands for unpaid taxes.

IV.

For a further and separate defense this defendant alleges
12 upon information and belief that the people of the State of New York are the owners in fee of all the lands described in the complaint and have been at all times during the two years last past, and now are, lawfully in the actual possession thereof by virtue of certain other certificates of tax sales duly made and executed by the comptroller of said State on or about the 14th day of December, 1885, to the people of the State of New York aforesaid, on or about the day last above mentioned, for the non-payment of non-resident taxes which had been duly assessed and levied upon the lands described in said complaint, which said certificates were outstanding and had remained in force for two years after the last day allowed by law to redeem from such sales in conformity with the provisions of the statutes of the State of New York, and by virtue of a certain other conveyance, duly executed by the people of the State of New York, the purchaser- at said last-mentioned sale, at the expiration of the two years allowed by law for redemption (within which time no person had redeemed the same), by Edward Wemple, as the comptroller of said State, on or about the 15th day of February, 1890, which said conveyance was duly recorded in the office of the clerk of said county of Franklin on the 3rd day of March, 1891, in Liber 89 of Deeds, at page 54, &c., in conformity with said acts of the said legislature; that each and every of said proceedings were in due form of law and in pursuance of the statutes of the State of New York regulating the sale of lands for unpaid taxes.

13 V.

For a further and separate defense this defendant alleges upon information and belief that the people of the State of New York are the owners in fee of all the lands described in the complaint, except one thousand acres in the N. W. corner of the N. W. quarter of said township 24, Great tract No. 1, of Macomb's purchase, in the town of Harriettstown, Franklin county, N. Y., and are and have been at all times during the two years last past lawfully in the actual possession thereof by virtue of a certain other certificate or certificates of tax sales duly made and executed by the comptroller of said State on or about the 23rd day of December, 1890, to the people of the State of New York, in pursuance of certain tax sales made by said comptroller, at Albany aforesaid, on or about the day last above mentioned, for the non-payment of non-resident taxes which has been duly assessed and levied upon the lands described therein; which said certificate or certificates were outstanding and had remained in force for two years after the last day allowed by law to redeem from such sales in conformity with the provisions of said acts of said legislature.

VI.

For a further and separate defence this defendant alleges that this action was not commenced within the time required by statute, and was not commenced until more than six months after the passage of the acts, chapter 448, Laws of 1885; chapter 217,
14 Laws of 1891, and chapter 711, Laws of 1893; and defendant therefore alleges that the action was not commenced within the time prescribed by law and is barred by the statute of limitations.

VII.

For a further and separate defence this defendant alleges upon information and belief that the plaintiff, on or about the 31st day of December, 1894, bought, procured, and took a promise from one Frank E. Smith, of Plattsburgh, N. Y., to convey a right or title, real or pretended (being the same title alleged in the complaint), to the lands and tenements described in the complaint, knowing that the said Frank E. Smith, the grantor thereof and the person making said covenant or promise, had not been in possession, and that he and those by whom he claimed had not, nor had either or any of them, been in the possession of the same or of the reversion or remainder thereof, and had not taken the rents and profits thereof for the space of one year before such covenant or promise was made.

VIII.

For a further and separate defence this defendant alleges upon information and belief that at the time of the delivery of the said deed from said Smith to the plaintiff of the lands described in the complaint, which deed was delivered on or about the 31st day of December, 1894, *and* the lands therein described and attempted to be conveyed, being the premises described in the complaint
15 herein, were and had been — a long time prior thereto in the actual possession of the people of the State of New York, claiming under a title adverse to that of said Smith and his grantor, and that said deed from said Smith to plaintiff was therefore void.

IX.

For a further and separate defence this defendant alleges upon information and belief that the plaintiff organized as a pretended corporation under the laws of the State of New Jersey, and had not otherwise organized, for the illegal purpose of bringing ejectment suits in said court against the defendant herein after it should have bought a pretended title to the property described in the complaint, and that this action was commenced in pursuance of such corrupt and illegal purpose.

X.

For a further and separate defence this defendant alleges upon information and belief that the alleged incorporators of the plaintiff organized as a pretended corporation under the laws of the State of

New Jersey for the illegal purpose of buying the right or title of said Frank E. Smith to the lands described in the complaint, knowing that the said Smith had not been in possession thereof, and that those from whom said Smith claimed to have derived title, or either of them, had not been in the possession thereof, or of the reversion or remainder thereof, and had not taken the rents and profits thereof for the space of one year before the covenant or promise to purchase thereafter taken and accepted was made, and knowing that the
16 said lands described in the complaint were in the actual possession of the State of New York, claiming under a title adverse to that of said Smith, and that said plaintiff has no assets or property other than its pretended paper title to the lands in the N. E. and N. W. quarters of said township 24, including the premises described in the complaint.

XI.

For a further and separate defence this defendant alleges that the plaintiff, on or about the 31st day of December, 1894, took a conveyance of the lands and tenements described in the complaint herein or of an interest therein from one Frank E. Smith, who at that time was not, nor had he ever been, in the possession thereof or of any part thereof; that on the said 31st day of December, 1894, and for a long time previous thereto the said lands and tenements were and still are the subject of controversy by proceedings brought by the grantors of the plaintiff and other persons claiming an interest in said lands before the comptroller of the State of New York for the cancellation of the tax sales under which the people of the State of New York hold title to said premises, and that said proceedings are still pending undetermined before said comptroller, and that the said plaintiff at the time of taking such conveyance well knew of the pendency of such proceedings, and that the grantor was not in possession of such lands or tenements or any part thereof, and that said proceedings so pending before said comptroller constitute a bar to this action.

17 XII.

For a further and separate defence this defendant alleges that Frank E. Smith, the grantor of the plaintiff, on or about the 21st day of December, 1894, took two certain conveyances of the lands and tenements described in the complaint herein or of an interest therein from Lelia E. Marsh, Pelatiah J. Marsh, George N. Ostrander, Smith M. Weed, Martin V. B. Turner, Emma Turner, John B. Riley, and A. Genevieve Riley; that at the time last above mentioned the said grantors to said Smith were not, nor were either of them, in the possession thereof or of any part thereof, nor had they — either of them ever been in the possession thereof or of any part thereof; that on the said 21st day of December, 1894, and for a long time previous thereto the said lands and tenements were and still are the subject of controversy by proceedings brought by the grantors of the plaintiff and other persons claiming an interest in said lands before the comptroller of the State of New York for the

cancellation of the tax sales under which the people of the State of New York hold title to said premises, and that said proceedings are still pending undetermined before said comptroller, and that the said plaintiff at the time of taking such conveyance well knew of the pendency of such proceedings, and that the grantor was not in possession of such lands or tenements or any part thereof, and that said proceedings so pending before said comptroller constitute a bar to this action.

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XIII.

For a further and separate defence this defendant alleges upon information and belief that on or about the 21st day of December, 1894, one Frank E. Smith, the grantor of the plaintiff, bought, procured, and took promises from Lelia E. Marsh, Pelatiah J. Marsh, George N. Ostrander, Smith M. Weed, Martin V. B. Turner, Emma Turner, John B. Riley, and A. Genevieve Riley to convey a right or title, real or pretended (being the same title alleged in the complaint), to the lands and tenements described in the complaint, knowing that the said grantors and the persons making said covenants or promises had not been in possession, and that they and those by whom they claimed had not, nor had either or any of them, been in the possession of the same or of the reversion or remainder thereof, and had not taken the rents and profits thereof for the space of one year before such covenants or promises were made.

XIV.

For a further and separate defense this defendant alleges upon information and belief that at the time of the delivery of the said deeds from said Lelia E. Marsh, Pelatiah J. Marsh, George N. Ostrander, Smith M. Weed, Martin V. B. Turner, Emma Turner, John B. Riley, and A. Genevieve Riley to the said Frank E. Smith, the grantor of said plaintiff, of the lands described in the complaint, which deeds were delivered on or about said 21st day of December, 1894, and the lands therein described and attempted to be

19 conveyed, being the premises described in the complaint herein, were and had been for a long time prior thereto in the actual possession of the people of the State of New York, claiming under title adverse to that of said grantors of said Frank E. Smith and to that of their grantors, and that said deeds to said Frank E. Smith were therefore void.

XV.

For a further and separate defence this defendant alleges upon information and belief that on or about the 29th day of November, 1885, one Frank E. Smith, the grantor of plaintiff, claiming to be the owner of the premises described in the complaint herein, made and filed his verified application in writing to the comptroller of the State of New York for the cancellation of the tax sales of 1877 and 1881 of said lands under which the people of the State of New York derives title thereto, and that thereafter such proceedings were had

before such comptroller that the said comptroller (with the consent of the said applicant), on or about the 2nd day of December, 1885, duly denied the said application upon the merits thereof, and that no proceedings were thereafter taken by said Frank E. Smith, or any other person, to review such determination, and that the time within which to review such determination has expired, and that uch determination is a bar to this action.

20 Wherefore said defendant demands judgment that the said complaint be dismissed with costs.

T. E. HANCOCK,
Attorney General of the State of New York and Attorney for said James A. Roberts, as Comptroller of said State, Defendant, Capitol, Albany, N. Y.

STATE OF NEW YORK,
Northern District of New York, } *ss:*
City & County of Albany,

James A. Roberts, being duly sworn, says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JAMES A. ROBERTS.

Sworn to before me this 20th day of February, 1896.

WILLIS E. MERRIMAN,
[L. S.] *Notary Public.*

Indorsed: Amended answer. (N. W. ¼, tp. 24.) Filed Feb. 21, 1896. W. S. Doolittle, clerk.

21 U. S. Circuit Court, Northern District of New York.

SARANAC LAND AND TIMBER COMPANY
against
JAMES A. ROBERTS, as Comptroller of the State of New York. } Law. 3110.

It is hereby stipulated, pursuant to section 649 of the Revised Statutes of the United States, that the issues of fact in this action be tried and determined by the court without the intervention of a jury, and the parties to this action hereby waive a jury.

Dated March 31, 1895.

G. D. B. HASBROUCH,
Dep. Att'y Gen.
WEEDS, SMITH & CONWAY,
Att'ys for Pl'ff.

Indorsed: Stipulation waiving jury. Filed Mar. 31, 1896. W. S. Doolittle, clerk.

22 U. S. Circuit Court, Northern District of New York.

SARANAC LAND AND TIMBER COMPANY *against* JAMES A. ROBERTS, as Comptroller. } No. 3110.

Plaintiff's Requests for Rulings on Propositions of Law.

148 U. S., 92. Plaintiff requests the court to declare as matter of law upon the whole case that it is entitled to judgment for the recovery of an estate in fee-simple in the northwest quarter of township 24, Great
Declined. A. C. C. tract one, Macomb's purchase, except one thousand acres thereof, to be laid out in a square form, in the northwest corner of said quarter, and for the recovery of possession of the same.

If the court shall decline to make the ruling above requested, or if it shall rule as a matter of law that de-
7 Blatch., 51; 9 Wall., 125. fendant is entitled to judgment, then plaintiff requests the court to affirm each of the following propositions of law, each of which is separately submitted and as a separate and distinct request, independent of the others.

Declined. A. C. C. First. Assuming that the sale by the comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of
23 several years, which taxes were assessed against separate and distinct parcels of the tract sold, such sale was not authorized by law in 1877. Such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of the laws of 1885 or chapter 711 of the laws of 1893.

Second. Assuming that the sale by the comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of several years, during one or more of which years a part of the tract sold was not assessed or
Declined. A. C. C. taxed at all, such sale was not authorized by law in 1877; such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893.

Assuming that the proof shows a sale by the comptroller of a tract of land as one parcel for the aggregate unpaid taxes of several years, some of which taxes were assessed against the whole tract sold and others against a part of the tract only,
Declined. A. C. C. such sale was not authorized by law in 1877; such mode of sale would be a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the laws of 1893.

Fourth. An assessment of non-resident land
I so rule. A. C. C. for taxation must describe the land to be taxed so that the parcel taxed can be identified and
24 distinguished, and a failure to so describe the land to be taxed is a jurisdictional defect in the proceedings, and if land be sold by the comptroller to enforce payment of taxes so assessed, the sale is void and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893.

Fifth. If the court shall find that the sale of the land in question at the 1877 tax sale was made for the unpaid taxes of 1866, 1867, 1868, 1869, and 1870, and that the taxes for the years 1868, 1869, and 1870, as against a parcel of 5,285 acres of the tract sold, were based upon an assessment of the said parcel in which it was described as follows:

"Township 24, Great tract 1, Macomb's pur-
Declined. A. C. C. chase, N. W. ¼, excepting one thousand acres lying in the N. W. corner; also 1,215 acres which is water, leaving 5,285 acres";

And if the court shall also find that the area of land covered by water in said northwest quarter, outside of the one thousand acres in the northwest corner, was substantially more or less than 1,215 acres, then such description was not sufficient to identify the parcel assessed with reasonable certainty, and the taxes based upon such assessment were void and the sale of 1877 was also void; such assessment was a jurisdictional defect in the proceedings, and the sale was not cured or validated by chapter 448 of the laws of 1885 or by chapter 711 of the laws of 1893.

25 Sixth. If the court shall find that the taxes of 1868, as against a parcel of one thousand acres of the tract
Declined. A. C. C. sold at the 1877 sale, were based upon an assessment in which said parcel was described as follows:

"Macomb's purchase, Great tract one, township 24, northwest corner of northwest quarter, 1,000 acres";

And that the taxes of 1879 and 1870 against said parcel were based upon assessments in which it was described as follows:

"Great tract No. 1, Macomb's purchase, township 24 1,000 acres lying in the northwest corner of the northwest quarter";

Then such description was not sufficient to identify the parcel assessed with reasonable certainty and the taxes based thereon were void; and if the sale of 1877 was made for such taxes, as well as the taxes of other years, such sale was also void; such assessment was a jurisdictional defect in the proceedings, and the sale was not cured or validated by chapter 448 of the Laws of 1885 or by chapter 711 of the Laws of 1893.

Seventh. If the court shall find that at the sale of 1881 the comptroller treated the land in question as already
Declined. A. C. C. the property of the State and struck the same off to the State without giving any opportunity for other persons to bid thereon, then the State acquired no title by reason of such sale, and such sale was not validated or made

effectual by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893.

26 Eighth. Chapter 448 of the Laws of 1885 is unconstitutional and void and is repugnant to the 14th amendment of the Constitution of the United States.

Declined. A. C. C.

WEEDS, SMITH & CONWAY,
Attorneys for Plaintiff, Plattsburgh, N. Y.

Indorsed: Plaintiff's requests for rulings on propositions of law. Filed Dec. 11, 1897. W. S. Doolittle, clerk.

27 U. S. Circuit Court, Northern District of New York.

SARANAC LAND AND TIMBER COMPANY, Plaintiffs,
against
JAMES A. ROBERTS, as Comptroller, Defendant. } No. 3110.

Plaintiff's Exceptions.

First. The plaintiff hereby excepts to the refusal of the court to declare, as matter of law, upon the whole case that it is entitled to judgment for the recovery of an estate in fee-simple in the northwest corner of township 24, Great tract one, Macomb's purchase, except one thousand acres thereof, to be laid out in a square form, in the northwest corner of said quarter, and for the recovery of the possession of the same.

Second. The plaintiff excepts to the refusal of the court to affirm the first proposition of law submitted to it by the plaintiff.

Third. The plaintiff excepts to the refusal of the court to affirm the second proposition of law submitted to it by the plaintiff.

Fourth. The plaintiff excepts to the refusal of the court to affirm the third proposition of law submitted to it by the plaintiff.

28 Fifth. Plaintiff excepts to the refusal of the court to affirm the fifth proposition of laws submitted to it by plaintiff.

Sixth. Plaintiff excepts to the refusal of the court to affirm the sixth proposition of law submitted to it by the plaintiff.

Seventh. The plaintiff excepts to the refusal of the court to affirm the seventh proposition of law submitted to it by the plaintiff.

Eighth. The plaintiff excepts to the refusal of the court to affirm the eighth proposition of law submitted to it.

WEEDS, SMITH & CONWAY,
Attorneys for Plaintiff, Plattsburgh, N. Y.

Indorsed: Plaintiff's exceptions. Filed Dec. 11, 1897. W. S. Doolittle, clerk.

29 United States Circuit Court, Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY, Plaintiff,
vs.
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant.

The issues in this action having been regularly brought on for trial before Hon. Alfred C. Coxe, at a term of the United States circuit court, held at Utica, N. Y., on the 30th day of March, 1896, and the court having heard the allegations and proofs of the parties and the argument of counsel, and, after due deliberation, having duly made, on the 12th day of November, 1897, a decision against the plaintiff, containing a statement of the facts found and conclusions of law thereon, directing a judgment against the plaintiff, as hereinafter stated, and the defendant's costs and disbursements having been duly adjusted at $367.76:

Now, on motion of T. E. Hancock, attorney for defendant—

It is adjudged that at the time of the commencement of this action the plaintiff was not entitled to the possession of the premises described in the complaint, but that the State of New York and the people thereof were the owners in fee-simple and entitled to
30 the possession of said real estate, and that the plaintiff's complaint be, and the same hereby is, dismissed upon the merits, and that the defendant do recover of the said plaintiff the said sum of $367.76, costs and disbursements.

Judgment signed, entered, and docketed this 17th day of February, 1898, at ten o'clock in the forenoon.

W. S. DOOLITTLE, *Clerk*,
By C. W. HIGGISON, *Deputy*.

Indorsed: Judgment. Sir: Take notice that the within is a copy of judgment duly filed and entered in the office of the clerk of the U. S. circuit court for the northern dist. of N. Y. on the — day of December, 1897. Yours, etc., T. E. Hancock, attorney general, attorney for def't. To Weeds, Smith & Conway, attorney for pl'ff.

Indorsement on cover: Law. No. 3110. United States circuit court, northern district of New York. The Saranac Land and Timber Company *v.* James A. Roberts, as comptroller of the State of New York. Judgment-roll. T. E. Hancock, attorney for def't. Costs, $367.76. Judgment signed, entered, and docketed February 17, 1898, at 10 o'clock a. m. W. S. Doolittle, clerk, by C. W. Higgison, deputy.

31 *Bill of Exceptions.*

United States Circuit Court, Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY
against
JAMES A. ROBERTS, as Comptroller of the State of New York. } Law. 3110.

Be it remembered that afterwards, to wit, on the 30th and 31st days of March, 1896, at a term of this court held by the Honorable Alfred C. Coxe, district judge, the issues in the above-entitled action came on for trial before the said judge and a jury, and upon such trial the following proceedings were had:

The plaintiff appeared by Mr. Frank E. Smith, Mr. Thomas F. Conway, and Mr. T. S. Jones, as counsel, and the defendant appeared by the Honorable G. D. B. Hasbrouck, deputy attorney general; Mr. Edward H. Leggett, and Mr. John H. Burke, as counsel.

The plaintiff, to maintain the issues on its part, gave evidence tending to prove that it was authorized by the State of New York to do business in this State, and had paid the license fee required by law; that the northwest quarter of township 24, Great tract No. one of Macomb's purchase, containing seven thousand five
32 hundred acres of land, more or less, being the land described in the complaint, was granted in fee-simple by the people of the State of New York, in the year 1798, to Daniel McCormack by letters patent, and that a paper title in fee to the said parcel of land (except one thousand (1,000) acres in the northwest corner thereof, the particular location of said 1,000 acres not being described in several of the deeds thereof) had passed by various mesne conveyances to, and at the time this action was begun was vested in, the plaintiff, "except that one of said conveyances in the plaintiff's chain of title was not produced in evidence, but only a certified copy of the record thereof in Jefferson county, where other lands therein described were situated, was produced, and that no evidence was offered accounting for failure to produce the original deed, nor was any parole evidence offered as to the contents of the original, and no proof of actual possession of said lands or any part thereof by plaintiff or any of his grantors was offered;" that the said land was wild, vacant forest land and was situated in the town of Harrietstown, Franklin county, New York; that in December, 1894, the defendant, as comptroller of the State of New York, caused to be published in the "Adirondack News," a newspaper published in Franklin county, New York, a notice in the words and figures following:

State Lands—Comptroller's Notice as to Ownership.

"To whom it may concern:

"Notice is hereby given that the following is the list of wild, vacant forest lands located in the county of Franklin to

which the State holds title, and that from and after three weeks from the 22nd day of December, 1894, possession thereof will be deemed to be in the comptroller of this State, pursuant to the provision of section 13, chapter 711, Laws of 1893.

"WILLIAM J. MORGAN,
"*Deputy Comptroller.*"

That the list of lands attached to and published with said notice contained the northwest quarter of township 24, Great tract one, Macomb's purchase; that said notice was published in said newspaper once a week for three successive weeks, beginning on December 22, 1894, and that this action was begun on January 29th, 1895. Plaintiff having rested its case, defendant, to maintain the issues on his part, gave evidence tending to prove that the land in question was sold by the comptroller for unpaid taxes, at the tax sale of 1877, to the people of the State of New York, and gave in evidence the certificate issued by the comptroller upon such sale, dated October 18th, 1877, showing the sale by the comptroller to the people of the State of New York for the unpaid taxes of 1866 to 1870, inclusive, of the northwest quarter of township 24, Great tract one, Macomb's purchase, for the sum of $2,756.40, and also gave in evidence the deed executed by the comptroller to the people of the State of New York in pursuance of the 1877 tax sale, dated June 9th, 1881; recorded in Franklin county clerk's office June 8th, 1882; which deed was in the usual form of deeds made by the comptroller upon sales of land for taxes, and purported to convey to the people
34 of the State of New York the northwest quarter of township 24, Great tract one, Macomb purchase.

Defendant then gave evidence tending to prove that the land in question, or 5,285 acres thereof, together with one thousand acres in this N. W. corner of said N. W. quarter, was again sold by the comptroller for unpaid taxes, at the tax sale of 1881, to the people of the State of New York, and gave in evidence two certificates issued by the comptroller upon said sale, each dated November 23rd, 1881, one of which showed the sale by the comptroller to the people of the State of New York, for the unpaid taxes of 1871, 1872, 1873, 1874, 1875, and 1876, of a parcel of land therein described as follows:

"Macomb's purchase, Great tract one, township 24, northwest ¼, ex. 1,000 a. N. W. cor. and 1,215 a. water, 5,285 acres," for the sum of $1,259.38; the other of which certificates showed the sale by the comptroller to the people of the State of New York, for the unpaid taxes of 1871, 1872, 1873, 1874, 1875, and 1876, of a parcel of land therein described as follows, viz:

"Macomb's purchase, Great tract one, township 24, northwest ¼, N. W. cor., 1,000 acres," for the sum of 241.27.

Defendant then offered in evidence the deed made by the comptroller to the people of the State of New York, in pursuance of the 1881 tax sale, dated October 31st, 1884; recorded in Franklin county clerk's office March 5th, 1887; which deed was in the usual form of deeds made by the comptroller upon tax sales, and which purported

to convey to the people of the State of New York two parcels
35 of land in the northwest quarter of township 24 by the following descriptions:

"Macomb's purchase, Great tract one (1), township twenty-four (24), northwest one-quarter (¼), five thousand two hundred and eighty-five (5,285) acres, more or less, being all that remains of said northwest quarter (¼) after excepting therefrom one thousand (1,000) acres in the northwest corner thereof and twelve hundred and fifteen (1,215) acres thereof covered by water.

"One thousand (1,000) acres in the northwest corner of said northwest quarter (¼)."

Counsel for plaintiff objected to this deed upon the ground that it was void upon its face for uncertainty of description. The court overruled the objection and received the deed in evidence; to which ruling counsel for plaintiff then and there excepted. (S. M., p. 31.)

Defendant then gave evidence tending to prove that the land in question was again sold by the comptroller for unpaid taxes, at the tax sale of 1885, to the people of the State of New York, and gave in evidence two certificates issued by the comptroller upon said sale, each dated December 29, 1885, one of which showed the sale by the comptroller to the people of the State of New York, for the unpaid taxes of 1852 to 1855, inclusive, and 1877, 1878, and 1879, of a parcel of land therein described as follows:

"Macomb's purchase, Great tract 1, township 24, northwest
36 ¼, ex. 1,000 a. N. W. cor. 6,500 acres," for the sum of $1,323.56; the other of which certificates showed the sale by the comptroller to the people of the State of New York, for the unpaid taxes of 1877, 1878, and 1879, of a parcel of land therein described as follows:

"Macomb purchase, Great tract 1, township 24, northwest ¼ N. W. cor., 1,000 acres," for the sum of $81.23.

Defendant then gave in evidence the deed made by the comptroller to the people of the State of New York in pursuance of the tax sale of 1885, dated February 15th, 1890; recorded in Franklin county clerk's office March 3rd, 1891; which deed was in the usual form of deeds made by the comptroller upon tax sales and purported to convey to the people of the State of New York two parcels of land in the northwest quarter of said township 24 by the following description:

"Macomb's purchase, Great tract one (1), township twenty-four (24), northwest quarter (¼), six thousand five hundred (6,500) acres, more or less, being all that remains of said northwest quarter, ¼, after exceping therefrom one thousand (1,000) acres in the northwest corner thereof, one thousand (1,000) acres in the northwest corner of said northwest quarter."

Defendant then gave evidence tending to prove that the land in question was again sold by the comptroller for unpaid taxes, at the tax sale of 1890, to the people of the State of New York, and offered in evidence the certificate issued by the comptroller to the people of the State of New York upon said tax sale of 1890; which certificate was in the words and figures following:

37 "No. —. Town of Harriettstown.
"Taxes of 1861, 1862, 1863, 1864, and 1865, $3,187.05.

"STATE OF NEW YORK, COMPTROLLER'S OFFICE,
"ALBANY, *December* 23, 1890.

"I certify that at a public auction which commenced December 11th, 1890, and closed this day, duly held by me at the capitol, in the city of Albany, pursuant to chapter thirteen of the first part of the Revised Statutes, in relation to the assessment and collection of taxes, and the acts amendatory thereof, the State purchased the following-described lot of land, situate in the county of Franklin, to be laid out at the expense of the purchasers, namely, Macomb purchase, Great tract 1, township 24, northwest ¼, ex. 1,000 a. N. W. cor., 6,500 acres, for which it has paid the sum of three thousand one hundred and eighty-seven $\frac{5}{100}$ dollars, and which said purchase entitles the people of the State of New York to a deed for said land and to all the benefits secured to purchasers by said statutes, if no person shall within two years from the date hereof redeem the same in pursuance of the provisions of the said statutes.

"EDMUND WEMPLE, *Comptroller.*

"Countersigned.
"SIDNEY W. PARK,
"*Chief Tax Clerk.*"

38 Counsel for plaintiff objected to the said certificate upon the ground that it was not evidence of a conveyance of title, it being at most only evidence of an equitable title, which cannot be considered in an action of ejectment in this court, and that the deed of the comptroller was the best evidence of a conveyance under the tax sale.

The court overruled the objection and received the certificate in evidence; to which ruling counsel for plaintiff then and there excepted.

No comptroller's deed in pursuance of the 1890 tax sale was offered by defendant.

Defendant then gave evidence tending to prove that on or about December 24, 1894, Smith M. Weed, George N. Ostrander, Martin V. B. Turner, Lelia E. Marsh, and John B. Riley, all residents of the State of New York, undertook to organize the plaintiff, and that for this purpose, by several deeds, said Smith M. Weed and others above-named conveyed to Frank E. Smith the lands described in the complaint, and certain other lands described in another action of ejectment now pending in the same court between the same parties, and certain other lands described in the complaint in another action of ejectment brought in this court by the same plaintiff against Ermina P. Hall, and that the certificate of incorporation of the plaintiff in the State of New Jersey was subscribed by said Frank E. Smith and Frank Walling, who is the clerk in said Smith's office, and one McClean; that the said Smith, Walling, and McClean became the sole trustees of said corporation, and
39 that said Smith subscribed for 120 shares of stock of said corporation, and Walling and McClean one share each, upon

the capitalization of said corporation in the sum of $12,200, the par value of each share being $100; that said Frank E. Smith took the land aforesaid, by virtue of said deeds, as trustees for his grantors and deeded the property conveyed by them to him in pursuance of an agreement and understanding that he was to convey the property conveyed to him to the corporation plaintiff, and that when the organization was effected he was to issue back to them shares of stock in proportion as they were interested in the real estate which was paid into the corporation as and for $12,000 of its capital stock; that from the time of the incorporation of the plaintiff down to the time of the commencement of this action the whole property of the plaintiff consisted of said lands in the State of New York and of two books in the office of another corporation in the State of New Jersey, which office the plaintiff claims to use as its office. As a matter of fact, the plaintiff never transacted any business in the State of New Jersey except to hold corporate meetings there. And defendant gave evidence also tending to prove that one of the purposes of said corporation was the bringing of this suit in the United States circuit court; also tending to prove that at the county treasurer's tax sale of 1853 a part of said township described as "N. W. ¼, ex. 1,336 a. said to be under water," leaving 6,164 acres, were sold to Keese and Tomlinson and a certificate of such sale made; that in 1858 Tomlinson conveyed to Barnard, a grantor of plaintiff, all interest acquired by him under such tax sale. No deed by the county judge and treasurer was produced, but the deed from Tomlinson to Barnard recited such a conveyance of the land sold after excepting 1,000 acres, N. W. corner of said N. W ¼, redeemed by Garrett Smith. No deed from Keese to any of plaintiff's grantors was produced. Defendant also gave evidence tending to prove that all of the lands described in the complaint were in the actual possession of the forest commission of the State of New York from 1885 up to the time of the commencement of this action, and that the deeds to the plaintiff were made and executed and delivered at times when the grantor was out of possession of said premises.

Defendant having rested his case, plaintiff in rebuttal gave evidence tending to prove that at the tax sale of 1877 the whole of the northwest quarter of township 24, Great tract one, Macomb's purchase, containing 7,500 acres, was sold by the comptroller as one parcel for the aggregate unpaid taxes of the years 1866, 1867, 1868, 1869, and 1870, amounting, exclusive of interest, to $1,484.59, and with interest and cost of sale added, to $2,756.40; that the taxes of each of the years 1866 and 1867 included in the said sale were assessed and levied against the whole of said quarter as a single and distinct parcel of land, the same having been assessed upon the assessment-roll of the town of Harriettstown in said years in the manner and form following and not otherwise:

41 1866.

Name of tract and description of land.	Number of acres.	Value of land.	Tax.	Highway tax.
Township 24, Great tract 1, Macomb's purchase, N. W. ¼	7,500	$7,000	$409.50	$46.75
1867.				
Township 24, Great tract 1, Macomb's purchase, N. W. ¼	7,500	10,000	350.00	

That in each of the years 1868, 1869, and 1870 the whole of the said northwest quarter of township 24 was not assessed or taxed; that in each of the said years 1868, 1869, and 1870 so much of the said quarter as was assessed and taxed was assessed upon the roll of the town of Harriettstown in the manner and form following, and not otherwise:

1868.

Number of tract and description of land.	Number of acres.	Value of land.	Tax.	Highway tax.	School tax.	Rejected tax.
Township 24, Great tract 1, Macomb's purchase, N. W. ¼, excepting one thousand acres lying in the N. W. corner; also 1,215 acres which *is* water, leaving 5,285 acres	5,285	$6,000	$78.00			
Macomb's purchase, Great tract 1, township 24, 1,000 acres, lying in the northwest corner of northwest ¼	1,000	1,100	14.30			
1869.						
Township 24, Great tract 1, Macomb's purchase, N. W. ¼, excepting one thousand acres lying in the N. W. corner; also 1,215 acres which *is* water, leaving 5,285 acres	5,285	6,000	132.00	$60.00	$39.00	
Macomb's purchase, Great tract No. 1, township 24, 1,000 acres, lying in the northwest corner of the N. W. ¼	1,000	1,100	24.20	11.00	7.15	
1870.						
Township 24, Great tract 1, Macomb's purchase, N. W. ¼, except one thousand acres lying in the N. W. corner; also 1,215 acres which *is* water, leaving 5,285 acres	5,285	4,500	99.90	90.00	16.20	
Macomb's purchase, Great tract No. 1, township 24, 1,000 acres, lying in the N. W. corner of the N. W. quarter	1,000	750	16.65	16.50	2.77	

That the taxes for each of the years 1868, 1869, and 1870, based upon the assessment-rolls for those years, as above set forth,
43 were included in the taxes for which the said sale of 1877 was made.

Plaintiff then gave evidence tending to prove that the northwest quarter of township 24, Great tract one, Macomb purchase, contains, and for more than thirty years has contained, a part of the Lower Saranac lake, a part of Middle Saranac (or Round) lake, and a part of Little Weller pond and a part of the Saranac river, and that it does not and for more than thirty years past it has not contained any other body of water excepting certain marshes along the Lower Saranac lake and along the Saranac river, which were covered with water during a part of the year- 1866 to 1870, inclusive; that no part of either of said bodies of water is within the limits of a parcel of land, laid out in a square form, in the northwest corner of the northwest quarter of said township 24, so as to contain one thousand acres; that the area of that portion of Lower Saranac lake which is contained within the said quarter, exclusive of marshes along said lake, was, in 1895, $947\frac{19}{20}$ acres, including islands therein, and that such islands were estimated to contain 43 acres; that the area of that portion of Round lake (or Middle Saranac) which is contained within the said quarter was $115\frac{2}{10}$ acres, including islands therein, and that such islands were estimated to contain $5\frac{5}{10}$ acres, all in 1895; that the area of that portion of Little Weller pond which is contained within the said quarter is about 20 acres.

Plaintiff then gave evidence tending to prove that at
44 each of the tax sales of 1881, 1885, and 1890, the northwest quarter of township 24, Great tract 1, Macomb purchase, was claimed by the comptroller to be already the property of the State; that the sales book from which the 1881 sale was conducted, containing a description of the different parcels of land liable to be sold at that sale, was prepared in anticipation of the sale; that opposite all lots of land to which the State claimed title a record in pencil was made; that opposite each of the two parcels of the northwest quarter of township 24, Great tract one, Macomb purchase, sold at the 1881 sale, the word "State" was written in pencil upon the said sales book; that on the sale of 1881, when any lot of land against which the word "State" had been written on the sales book was announced to be sold, the person conducting the sale on behalf of the comptroller, as soon as the description of such parcel had been read by the auctioneer, would immediately bid the said lot in for the State, and the auctioneer, without calling for bids and without giving any opportunity to the person attending the sale to bid, would immediately strike such lot off to the State; that any bids which were made or attempted to be made by any person attending the sale for any lot of land against which the word "State" had been written on the sales book were rejected; that in anticipation of the 1885 sale a list of lands claimed to be the property of the States was prepared in the comptroller's office, which list contained the northwest quarter of township 24, Great tract one, Macomb's purchase;

that the procedure on the sale of 1885 was the same as on the
45 1881 sale; that when any lot of land contained in the list of State lands was announced for sale it was immediately bid in for the State, no opportunity being given for other persons to bid thereon, any bids made or attempted to be made by other bidders being rejected; that upon the 1890 tax sale the procedure as to all lands liable to sale thereat, and then claimed by the State, was the same as at the 1881 and 1885 sales, all such lands being at once struck off to the State, but no evidence was offered tending to show that at any of said sales of 1881, 1885, and 1890 any bids whatever were offered by any person whatsoever on the lands in question.

The plaintiff having again rested its case, the defendant then gave evidence tending to prove that during the year 1866 to 1870, inclusive, there was a dam across the outlet of the Lower Saranac lake, built for the purpose of facilitating the driving of logs down the Saranac river; that when the dam was closed the level of the lake was raised to from two to five feet; that when the dam was open, so as to increase the flow of the water in the river, the level of the lake would be drawn down; that by reason of this dam the marsh or low lands near the head of the lake *was* generally covered by water; that the area of land covered by the water of the Lower Saranac lake within the limits of said northwest quarter of township 24 during the years 1866 to 1870, which land is not now so covered,
was, on an average, about two hundred to two hundred and
46 fifty acres; that there were other marshes around Little Weller pond which *was* covered by water in the spring of the year.

When the testimony in the case was closed the counsel for each of the respective parties, with the approval of the court, admitted that there was no question of fact in the case to be submitted to the jury; that the issues depended upon the construction that the court should give to the law; and thereupon the jury was discharged, and a written stipulation waiving a jury trial was signed by the attorneys of record for the respective parties and filed with the clerk.

Thereafter, and in due time, the plaintiff requested the court to affirm each of the following propositions of law, each of which was separately submitted and as a separate and distinct request, independent of the others, namely:

First. Assuming that the sale by the comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of several years, which taxes were assessed against separate and distinct parcels of the tract sold, such sale was not authorized by law in 1877. Such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893.

The court refused to so rule; to which refusal counsel for plaintiff then and there excepted.

47 Second. Assuming that the sale by the comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of several years, during one or more of

which years a part of the tract sold was not assessed or taxed at all, such sale was not authorized by law in 1877; such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893.

The court refused to so rule; to which refusal counsel for plaintiff then and there excepted.

Third. Assuming that the proof shows a sale by the comptroller of a tract of land as one parcel for the aggregate unpaid taxes of several years, some of which taxes were assessed against the whole tract sold and others against a part of the tract only, such sale was not authorized by law in 1877; such mode of sale would be a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893.

The court refused to so rule; to which refusal counsel for plaintiff then and there excepted.

Fourth. An assessment of non-resident land for taxation must describe the land to be taxed, so that the parcel taxed can be identified and distinguished, and a failure to so describe the land to be taxed is a jurisdictional defect in the proceedings, and if the land be sold by the comptroller to enforce payment of taxes so assessed, the sale is void and is not cured or validated by chapter 448
48 of the Laws of 1885 or by chapter 711 of the Laws of 1893.

The court so ruled.

Fifth. If the court shall find that the sale of the land in question at the 1877 tax sale was made for the unpaid taxes of 1866, 1867, 1868, 1869, and 1870, and that the taxes for the years 1868, 1869, and 1870, as against a parcel of 5,285 acres of the tract, were based upon an assessment of the said parcel in which it was described as follows:

Township 24, Great tract 1, Macombe's purchase, N. W. ¼, excepting one thousand acres lying in the N. W. corner; also 1,215 acres which is water, leaving 5,285 acres; and if the court shall also find that the area of land covered by water in said northwest quarter, outside of the one thousand acres in the northwest corner, was substantially more or less than 1,215 acres, then such description was not sufficient to identify the parcel assessed with reasonable certainty, and the taxes based upon such assessment were void and the sale of 1877 was also void; such assessment was a jurisdictional defect in the proceedings and the sale was not cured or validated by chapter 448 of the Laws of 1885 or by chapter 711 of the Laws of 1893.

The court refused to so rule; to which refusal counsel for plaintiff then and there excepted.

Sixth. If the court shall find that the taxes of 1868, as
49 against a parcel of one thousand acres of the tract sold at the 1877 sale, *was* based upon an assessment in which said parcel was described as follows:

"Macomb purchase, Great tract one, township 24, northwest corner of northwest quarter, 1,000 acres," and that the taxes of 1869

and 1870, against said parcel, were based upon assessments in which it was described as follows:

"Great tract No. 1, Macomb's purchase, township 24, 1,000 acres, lying in the northwest corner of the northwest quarter," then such description was not sufficient to identify the parcel assessed with reasonable certainty and the taxes based thereon were void, and if the sale of 1877 was made for such taxes as well as the taxes of other years, such sale was also void; such assessment was a jurisdictional defect in the proceedings, and the sale was not cured or validated by chapter 448 of the Laws of 1885 or by chapter 711 of the Laws of 1893.

The court refused to so rule; to which refusal counsel for plaintiff then and there excepted.

Seventh. If the court shall find that at the sale of 1881 the comptroller treated the land in question as already the property of the State, and struck the same off to the State without giving any opportunity for other persons to bid thereon, then the State acquired no title by reason of such sale, and such sale was not validated or made effectual by chapter 448 of the Laws of 1885 or by chapter 711 of the Laws of 1893.

The court refused to so rule; to which refusal counsel for plaintiff then and there excepted.

50 Eighth. Chapter 448 of the Laws of 1885 is unconstitutional and void and is repugnant to the 14th amendment of the Constitution of the United States.

The court refused to so rule; to which refusal counsel for plaintiff then and there excepted.

Thereafter the court made a general finding in favor of the defendants.

And forasmuch as the matters aforesaid and the rulings of the court thereon do not appear of record, and the time within which a bill of exceptions may be tendered having been enlarged by consent of parties, the plaintiff prays that this its bill of exceptions may be allowed, which is done this 24th day of May, 1898.

ALFRED C. COXE, *U. S. J.*

Indorsed: U. S. circuit court, northern district of N. Y. 3110. The Saranac Land and Timber Company against James A. Roberts, as comptroller of the State of New York. Bill of exceptions. Weeds, Smith & Conway, attorneys for pl'ff, Plattsburgh, New York.

SIR: You will please take notice that the within is the bill of exceptions proposed by plaintiff in the within-entitled action.

Dated March 23, '98.

Yours, &c., WEEDS, SMITH & CONWAY,
Att'ys for Plaintiff, Plattsburgh, N. Y.

To Hon. T. E. Hancock, att'y gen.

Due service of copy of within bill of exceptions as settled this day is hereby admitted.
May 24, 1898.

T. E. HANCOCK,
Att'y Gen'l, Att'y for Def't.

Filed May 24, 1898.

W. S. DOOLITTLE, *Clerk.*

51 United States Circuit Court, Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY, Plaintiff,
against
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant. } Law. 3110.

It is hereby stipulated and agreed that the judgment-roll in the above-entitled action be amended by striking therefrom the following papers: First, the original answer, the same having been superseded by the amended answer.
Dated May 26, 1898.

T. E. HANCOCK,
Attorney General, Att'y for Def't.
WEEDS, SMITH & CONWAY,
Att'ys for Pl'ff.

Indorsed: Stipulation. Filed Jun- 3, 1898. W. S. Doolittle, clerk.

52 United States Circuit Court, Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY
vs.
JAMES A. ROBERTS, as Comptroller of the State of New York.

Demurrer. In ejectment.

Weeds, Smith & Conway and Frank Smith, for the plaintiff.
T. E. Hancock, attorney general, and G. D. B. Hasbrouck, deputy attorney general, of New York, for the defendant.

COXE, *J.:*

This is an action of ejectment. The plaintiff is a New Jersey corporation. The defendant is the comptroller of the State of New York. The complaint alleges that the plaintiff is seized in fee-simple and entitled to the possession of a large tract of forest land situated in Franklin county, within the northern district of New York, and that the defendant, as comptroller, is in actual possession of said land and unlawfully withholds the possession thereof from the plaintiff.

The defendant demurs upon the ground that the court has no jurisdiction, for the reason that the real party in interest is the State of New York, and the State cannot be sued.

The situation, then, is this: A citizen of New Jersey who
53 is the owner in fee of land in this district sues in ejectment a citizen of New York who is in unlawful possession of the plaintiff's land. All this is admitted by the demurrer. The sole question is, Does the fact that the defendant holds as comptroller of the State deprive the court of jurisdiction? As the issue now stands, the defendant is a naked trespasser, in possession of plaintiff's land without color of right. It is thought that the demurrer should be overruled on the authority of United States *v.* Lee, 106 U. S., 196–204; Tindall *v.* Wesley, 65 Fed. Rep., 731; Pennoyer *v.* McConnaughy, 140 U. S., 1, and cases there cited.

The court cannot anticipate what defense the defendant will interpose. He may seek to justify under an unconstitutional law or a law conferring no valid title. If the allegation be true that the plaintiff is the owner in fee and entitled to the possession of the land in question, it is not easy to see how he can defend under a valid law. The mere fact that he is sued as comptroller is not enough to oust the court of jurisdiction. The complaint shows nothing more.

But suppose the court proceeds a step further and assumes that the defendant is sued and will justify under chapter 711 of the Laws of 1893. Section 13 of that act provides:

"The comptroller may advertise once a week for at least three weeks successively, a list of the wild, vacant and forest lands to which the State holds title, from a tax sale or otherwise, in one or more newspapers to be selected by him, published in the county in which the lands are situated, and from and after the expiration of such time, all such wild, vacant, or forest lands are hereby declared to be and shall be deemed to be in the actual possession of the comptroller, and such possession shall be deemed to continue until he has been dispossessed by the judgment of a court of competent jurisdiction."

54 This section must be considered in its entirety. The last clause cannot be ignored. It would seem clear that it was the intention of the legislature to submit the question of the comptroller's title to the decision of a court having jurisdiction. It was conceded at the argument that the theory of the demurrer made the clause in question inoperative, and would enable the defendant to seize and hold the property of others without being amenable to the process of any court. There is no occasion for so drastic a construction. In placing the comptroller in possession of the forest lands the legislature recognized the probability of controversies over his title and pointed out the manner in which such dispute should be decided. The plaintiff is pursuing the remedy of the statute. It is a suit sanctioned by the State.

Regan *v.* Trust Co., 154 U. S., 362, 392.

The demurrer is overruled.

Indorsed: Decision. Coxe, J. Filed Jun- 28, 1895. W. S. Doolittle, clerk.

55 United States Circuit Court, Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY
vs.
JAMES A. ROBERTS, as Comptroller, etc.

At law. Tried by the court for decision on demurrer. See 68 Fed. Rep., 521.

Frank E. Smith and Weeds, Smith and Conway, for the plaintiff; T. E. Hancock, G. D. B. Hasbrouck, E. H. Leggett, and John H. Burke, for the defendant.

COXE, *J.*:

I am of the opinion that this cause must be decided in favor of the defendant upon the authority of People *v.* Turner, 145 N. Y., 451, affirmed by the Supreme Court of the United States October 18, 1897. By these decisions the constitutionality of chapter 448 of the Laws of New York of 1885 is affirmed, and its validity, as a curative act and as a short statute of limitations, is fully recognized. The defects involved in the Turner case were similar to and in some instances identical with those relied on by the plaintiff in the case at bar.

56 Assuming these defects to be proved, they were irregularities which were cured by the act of 1885. The plaintiff has failed to show either the payment of the taxes or that they were levied without legal right; in other words, it has failed to show jurisdictional errors such as would render the assessment proceedings void and which the legislature had no power to remedy.

The court cannot adopt the view of the learned counsel for the plaintiff in his ingenious effort to prove that the constitutionality of the act of 1885 is still an open question. His argument is sufficiently answered by the plain and unequivocal language of the supreme court as follows:

"It was argued in behalf of the plaintiff in error that the statute was unconstitutional because it did not allow him any opportunity to assert his rights, even within six months after its passage; but the statute did not take away any right of action which he had before its passage, but merely limited the time within which he might assert such a right. Within the six months he had every remedy which he would have had before the passage of the statute. If he had no remedy before, the statute took none away. From the judgments of the court of appeals in the case at bar and in the subsequent case of People *vs.* Roberts, 151 N. Y., 540, there would appear to have been some difference of opinion in that court upon the question whether his proper remedy was by direct application to the comptroller to cancel the sale or by action of ejectment against the comptroller or the forest commissioners; but as that court has uniformly held that he had a remedy, it is not for us to determine what that remedy was under the local constitution and laws."

The plaintiff has failed to prove that it "is seized in fee-simple and entitled to the possession" of the lands in dispute.

The complaint is dismissed with costs.

Indorsed: Decision. Coxe, J. Filed Nov. 12, 1897. W. S. Doolittle, clerk.

57 U. S. Circuit Court, Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY
against
JAMES A. ROBERTS, as Comptroller of the State of New York. } Law. 3110.

To the honorable the judges of the said circuit court:

The petition of the Saranac Land and Timber Company respectfully shows:

I. That on or about January 24th, 1895, it brought this action of ejectment in this court against the defendant to recover possession of a tract of 7,500 acres of land situate in the town of Harriettstown, Franklin county, New York, known as the northwest quarter of township 24, Great tract one, Macomb's purchase.

II. That this action was brought to trial in March, 1896, and on February 17th, 1898, judgment was entered herein in favor of defendant, by which it was adjudged that plaintiff was not entitled to the possession of said land, and that the people of the State of New York were the owners in fee-simple of the said land and entitled to the possession thereof.

III. That, as your petitioner is informed and believes, the value of the land sought to be recovered in this action is much more than five thousand dollars, as will more fully appear by the affi-
58 davit of Smith M. Weed, hereto annexed; that in March, 1896, defendant, on a motion to postpone the trial of this cause and another of a similar nature, between the same parties, affecting the west half of the northeast quarter of the same township, containing 3,750 acres, being a parcel of land contiguous to that affected by this action and substantially the same in character, both tracts being wild, vacant forest land, wholly unimproved, made and filed an affidavit in which he stated as follows:

"That said action involves the title of the State to certain wild forest lands in the forest preserve of said State, the value of which land is upwards of two hundred thousand dollars."

IV. That, as your petitioner is advised by counsel and believes, upon the trial of this action certain errors were committed by the trial judge to the prejudice of your petitioner, and that the judgment rendered against it, as aforesaid, is erroneous and against your petitioner's right to recover the aforesaid land.

V. That, as your petitioner is advised by counsel and believes, this case is one in which a law of the State of New York, to wit, chapter 448 of the Laws of 1885, is claimed by plaintiff to be in contravention of the Constitution of the United States.

Wherefore your petitioner prays that a writ of error, returnable into the Supreme Court of the United States, may be allowed, and that a citation issue to the defendant.

THE SARANAC LAND & TIMBER COMPANY,
By WEEDS, SMITH & CONWAY,
Its Attorneys.

59 CITY AND COUNTY OF NEW YORK, *ss:*

Frank E. Smith, being duly sworn, says:

I am treasurer of the Saranac Land and Timber Company. I have read the foregoing petition for a writ of error and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

FRANK E. SMITH.

Sworn to before me this — day of May, 1898.

——— ———.

60 U. S. Circuit Court, Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY *against* JAMES A. ROBERTS, as Comptroller of *of* the State of New York. } Law. 3110.

CITY AND COUNTY OF NEW YORK, *ss:*

Smith M. Weed, being duly sworn, says:

I. I reside at Plattsburgh, New York.

II. I have been familiar with wild forest lands in the county of Franklin, New York, and especially in the town of Harriettstown, in said county, for more than twenty years. I have individually bought and sold many lots and parcels of wild lands in said county, and I am familiar with the prices and values of such lands.

III. I know the northwest quarter of township 24, Great tract one, Macomb's purchase, containing 7,500 acres, and being the tract of land sought to be recovered in the above action.

IV. The value of said tract of land, in my opinion, is at least the sum of ten dollars per acre, or seventy-five thousand dollars ($75,000.00).

SMITH M. WEED.

Sworn before me this — day of May, 1898.

——— ———.

Indorsed: Petition for writ of error to supreme court and citation and affidavit of Smith M. Weed. Filed May 24, 1898. W. S. Doolittle, clerk.

61 *Bond for Costs.*

Circuit Court of the United States of America for the Northern District of New York, in the Second Circuit.

THE SARANAC LAND AND TIMBER COMPANY, Plaintiff in Error,
vs.
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant in Error.

Know all men by these presents that we, Smith M. Weed and Frank E. Smith, both of Plattsburgh, New York, are held and firmly bound unto the above-named James A. Roberts, as comptroller, in the sum of five hundred ($500.00) dollars, to be paid to the said Roberts, as comptroller; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas the above-named The Saranac Land and Timber Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-
62 entitled suit by the judge of the circuit court of the United States for the northern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff shall prosecute the said suit to effect and answer all costs if it fail to make the said writ good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SMITH M. WEED. [SEAL.]
FRANK E. SMITH. [SEAL.]

Sealed and delivered and taken and acknowledged this — day of May, 1898, before me.

— —.

NORTHERN DISTRICT OF NEW YORK, } ss:
County of Oneida,

On this 24th day of May, 1898, before me personally came Frank E. Smith, to me personally known to be one of the persons described in and who executed the foregoing bond, and acknowledged that he executed the same.

C. W. HIGGISON,
Notary Public.

UNITED STATES OF AMERICA, } ss:
Northern District of New York,

Smith M. Weed and Martin V. B. Turner, each being duly sworn, depose and say, each for himself, that he is a freeholder in

63 the northern district of New York; that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

SMITH M. WEED.
MARTIN V. B. TURNER.

Sworn to this 23d day of May, A. D. 1898, before me—

WARREN DOW,
[L. S.] *Notary Public, Clinton Co.*

NORTHERN DISTRICT OF NEW YORK, *Oneida County,* } ss:

Frank E. Smith, being duly sworn, says that he is worth the sum of $1,000.00 over and above all his debts and liabilities.

FRANK E. SMITH.

Sworn before me this 24th day of May, 1898.

C. W. HIGGISON,
Notary Public, Oneida Co., N. Y.

Indorsed: Bond for costs on error to U. S. Supreme Court. Approved. A. C. Coxe, U. S. J. Filed May 24, 1898. W. S. Doolittle, clerk.

64 U. S. Circuit Court, Northern District of New York.

THE SARANAC LAND AND TIMBER COMPANY, Plaintiff,
against
JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant. } Law. 3110.

Assignment of Errors and Prayer for Reversal.

The plaintiff above named, The Saranac Land and Timber Company, hereby alleges that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

First. That the court erred in refusing to affirm the first proposition of law submitted by the plaintiff, as follows:

"First. Assuming that the sale by the comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of several years, which taxes were assessed against separate and distinct parcels of the tract sold, such sale was not authorized by law in 1877, such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void, and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893."

65 Second. That the court erred in refusing to affirm the second proposition of law submitted by the plaintiff, as follows:

"Second. Assuming that the sale by the comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of several years, during one or more of which years a

part of the tract sold was not assessed or taxed at all, such sale was not authorized by law in 1877; such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893."

Third. That the court erred in refusing to affirm the third proposition of law submitted by the plaintiff, as follows:

"Third. Assuming that the proof shows a sale by the comptroller of a tract of land as one parcel for the aggregate unpaid taxes of several years, some of which taxes were assessed against the whole tract sold and others against a part of the tract only, such sale was not authorized by law in 1877; such mode of sale would be a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893."

Fourth. That the court erred in refusing to affirm the fifth proposition of law submitted by the plaintiff, as follows:

66 "Fifth. If the court shall find that the sale of the land in question at the 1877 tax sale was made for the unpaid taxes of 1866, 1867, 1868, 1869, and 1870, and that the taxes for the years 1868, 1869, and 1870, as against a parcel of 5,285 acres of the tract sold, were based upon an assessment of the parcel in which it was described as follows:

"Township 24, Great tract 1, Macomb's purchase, N. W. ¼, excepting one thousand acres lying in the N. W. corner; also 1,215 acres which is water, leaving 5,285 acres;

"And if the court shall also find that the area of land covered by water in said northwest quarter, outside of the one thousand acres in the northwest corner, was substantially more or less than 1,215 acres, then such description was not sufficient to identify the parcel assessed with reasonable certainty, and the taxes based upon such assessment were void and the sale of 1877 was also void; such assessment was a jurisdictional defect in the proceedings, and the sale was not cured or validated by chapter 448 of the Laws of 1885 or by chapter 711 of the Laws of 1893."

Fifth. That the court erred in refusing to affirm the sixth proposition of law submitted by the plaintiff, as follows:

"Sixth. If the court shall find that the taxes of 1868, as
67 against a parcel of one thousand acres of the tract sold at the 1877 sale, were based upon an assessment in which said parcel was described as follows:

"Macomb's purchase, Great tract one, township 24, northwest corner of northwest quarter, 1,000 acres;

"And that the taxes of 1879 and 1870 against said parcel were based upon assessments in which it was described as follows:

"Great tract No. 1, Macomb's purchase, township 24, 1,000 acres lying in the northwest corner of the northwest quarter;

"Then such description was not sufficient to identify the parcel assessed with reasonable certainty and the taxes based thereon were void; and if the sale of 1877 was made for such taxes, as well as the taxes of other years, such sale was also void; such assessment

was a jurisdictional defect in the proceedings, and the sale was not cured or validated by chapter 448 of the Laws of 1885 or by chapter 711 of the Laws of 1893."

Sixth. That the court erred in refusing to affirm the seventh proposition of law submitted by the plaintiff, as follows:

"Seventh. If the court shall find that at the sale of 1881 the comptroller treated the land in question as already the property of the State and struck the same off to the State without giving any opportunity for other persons to bid thereon, then the State acquired no title by reason of such sale, and such sale was not validated
68 or made effectual by chapter 448 of the Laws of 1885 or by chapter 711 of the Laws of 1893."

Seventh. That the court erred in refusing to affirm the eighth proposition of law submitted by the plaintiff, as follows:

"Eighth. Chapter 448 of the Laws of 1885 is unconstitutional and void and is repugnant to the 14th amendment of the Constitution of the United States."

Eighth. That the court erred in receiving in evidence the deed made by the comptroller to the people of the State of New York in pursuance of the tax sale of 1881, dated October 31st, 1884, which deed purported to convey to the people of the State of New York two parcels of land in the northwest quarter of township 24 by the following description:

"Macomb's purchase, Great tract 1, township 24, northwest quarter, 5,285 acres, more or less, being all that remains of the said northwest quarter after excepting therefrom 1,000 acres in the northwest corner thereof and 1,215 acres thereof covered by water.

"1,000 acres in the northwest corner of the northwest quarter."

And in overruling the plaintiff's objections to the said deed that it was void upon its face for uncertainty of description.

69 Ninth. That the court erred in receiving in evidence the certificate of sale issued by the comptroller to the people of the State of New York upon the tax sale of 1890, and in overruling the objection of the plaintiff to said certificate that it was not evidence of a conveyance of the title, but at most only evidence of an equitable title, which could not be considered in an action of ejectment in this court, and that the deed of the comptroller was the best evidence of a conveyance under the tax sale.

Wherefore the said plaintiff, The Saranac Land and Timber Company, prays that the judgment rendered against it in the above-entitled action may be reversed.

WEEDS, SMITH & CONWAY,
Attorneys for Plaintiff, Plattsburgh, New York.

Indorsed: Assignment of errors and prayer for reversal. Filed May 24, 1898. W. S. Doolittle, clerk.

70 By the Honorable Alfred C. Coxe, one of the judges of the circuit court of the United States for the northern district of New York, in the second circuit.

To James A. Roberts, as comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol, in the city of Washington, on the 23 day of June, 1898, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein The Saranac Land and Timber Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, in the city of Utica, in the district and circuit above named, this 24th day of May, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of these United States the one hundred and twenty-second.

ALFRED C. COXE,
Judge of the Circuit Court of the United States for the Northern District of New York, in the Second Circuit.

71 [Endorsed:] At law. No. 3110. United States Supreme Court. The Saranac Land and Timber Company, pl'ff in error, *vs.* James A. Roberts, as comptroller, &c., d'f't in error. Original citation. Weeds, Smith & Conway, Plattsburgh, N. Y. D. C. N. Service of copy of the within citation is hereby admitted this 1st day of June, 1898. T. E. Hancock, attorney general. U. S. circuit court, N. D. of N. Y. Filed Jun- 3, 1898. W. S. Doolittle, clerk.

Endorsed on cover: Case No. 16,916. N. New York C. C. U. S. Term No., 331. The Saranac Land and Timber Company, plaintiff in error, *vs.* James A. Roberts, as comptroller of the State of New York. Filed June 20th, 1898.

FILED
OCT 11 1899
JAMES H. McKENNEY,
Clerk.

No. 94.

Brief of Smith & Conway for P.

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Oct. 11, 1899.

No. ~~331~~ 94.

THE SARANAC LAND AND TIMBER COMPANY,
Plaintiff in Error,

against

JAMES A. ROBERTS, AS COMPTROLLER OF THE STATE OF NEW YORK,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Plaintiff in Error,
Plattsburgh, N. Y.

THE MARTIN B. BROWN COMPANY, Printers, 49 to 57 Park Place, N. Y.

Supreme Court of the United States.

SARANAC LAND AND TIMBER COMPANY,
Plaintiff in Error,
against
JAMES A. ROBERTS, as Comptroller of the State of New York,
Defendant in Error.

October Term, 1897
No. 941.

Error to the Circuit Court of the United States for the Northern District of New York.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is an action of ejectment brought by the plaintiff in error—a New Jersey corporation—against the defendant in error—a citizen of New York—to recover a tract of 7,500 acres of wild, vacant forest land, known as the Northwest Quarter of Township 24, Great Tract One, Macomb's purchase, situated in Franklin County, in the Northern District of the State of New York.

The writ of error is taken direct to this Court under the sixth subdivision of section five of the Judiciary Act of March 3, 1891, the case being one in which a law of the State of New York is claimed to be in con-

travention of the Constitution of the United States. The law of New York, the validity of which is drawn in question is chapter 448 of the Laws of that State of 1885—a short statute of limitation designed to validate sales of land theretofore made for unpaid taxes. This statute is the same act which was before this Court on error to the New York Court of Appeals in *Turner* vs. *New York* (1897), 168 U. S., 90, in which case the judgment of the State Court sustaining the law was affirmed.

The act in question, chapter 448 of 1885, became section 12 of chapter 711 of the Laws of 1893, which latter act was a partial revision of the law in regard to tax sales (Appendix, p. 104).

The State of New York claims title to the land in question under tax sales, and the real object of the action is to try the validity of these sales and of the title so acquired.

The action was brought against the defendant as Comptroller of the State, upon the theory that he was in actual possession of the land under a statute of the State, and that an action of this nature had been authorized by the Legislature for the purpose of trying the title of the State.

That statute is as follows:

> "The comptroller may advertise once a week
> " for at least three weeks successively, a list of the
> " wild, vacant and forest lands to which the state
> " holds title, from a tax sale or otherwise, in one
> " or more newspapers to be selected by him, pub-
> " lished in the county in which the lands are situ-
> " ated, and from and after the expiration of such
> " time, all such wild, vacant or forest lands are
> " hereby declared to be and shall be deemed to be
> " in the actual possession of the comptroller, and
> " such possession shall be deemed to continue

" until he has been dispossessed by the judgment " of a court of competent jurisdiction."

Chapter 711 of Laws of 1893, sec. 13, being a revision of chapter 453 of Laws of 1885, sec. 4 ; Appendix, pp. 86, 104.

The complaint is in the usual form of ejectment against a defendant in actual possession (Record, p. 2).

The defendant demurred to the complaint upon the ground that the Court had not jurisdiction of defendant as Comptroller, nor of the State of New York, which was the real party in interest (Record, p. 4).

The Court overruled the demurrer, holding, *first*, that defendant, being sued as a trespasser, could not defeat the jurisdiction of the Court by merely *alleging* the title of the State ; and, *second*, that express authority to bring the action had been given by the State by chapter 711 of the Laws of 1893—the act above quoted (Record, p. 26–27).

The defendant then answered denying all the allegations of the complaint (except the corporate organization of plaintiffs and the citizenship of defendant), and setting up the tax title claimed by the State, and alleging the *State* to be in actual possession under them (Answer, secs. II., III., IV. and V.). He also set up as separate and special defenses : *First*, the six months' statute of limitation, contained in chapter 448 of the Law of 1885—the act claimed to be in contravention of the Constitution of the United States (sec. VI. of answer) ; *second*, different aspects of the statutes against champerty (secs. VII., VIII., X. XI., XII., XIII., XIV. of answer) ; *third*, illegal organization of plaintiff (sec. IX. of answer) ; and, *fourth*, a former adjudication by the Comptroller made on an application to cancel one of the tax sales under which the State claimed title.

The trial began before the Court and jury.

The following facts appeared upon the trial and are now shown by the record and bill of exceptions.

(1) The land in question is wild forest land. It was granted by the State of New York in 1798 to Daniel McCormick in fee simple, and plaintiff has succeeded to his title (except as to a parcel of 1000 acres in the northwest corner) unless the same has been cut off and re-transferred to the State by the tax sales hereafter mentioned (Record, p. 16).

(2) It was sold to the State at the tax sale of 1877 for the unpaid taxes of 1866 to 1870, inclusive, amounting to $2,756.40. The usual deed to the State was made on June 8, 1881, and recorded in the proper office on June 9, 1882 (Record, p. 17).

(3) It was again in form sold to the State at the tax sale of 1881 for the taxes of 1871–1876, and the usual deed executed October 31, 1884, which was duly recorded March 5, 1887 (Record, p. 17). At this sale the land was treated as already State property from the preceding sale, and no opportunity was given for any person to bid thereon, it being immediately struck off to the State in pursuance of a statute which so directed (Record, p. 22).

(4) It was again in form sold to the State at the tax sale of 1885 for the taxes of 1877 to 1879 and the usual deed made February 15, 1890, and recorded March 3, 1891 (Record, p. 18). At this sale it was again treated as State property and struck off to the State without giving opportunity for bids (Record, p. 22).

(5) It was again in form sold to the State at the tax sale of 1890 for the taxes of 1861–1865, and a certificate of such sale given, but no deed. At this sale as at the two prior ones, it was treated as State property and no bids allowed (Record, pp. 19–22).

(6) At the sale of 1877 the whole of the Northwest Quarter of Township 24 was sold as one parcel for the aggregate unpaid taxes of the years 1866 to 1870, in-

clusive, amounting, exclusive of interest, to $1,484.59, and with interest and costs added to $2,756.40. The taxes of each of the years 1866 and 1867 were assessed against the whole quarter as one parcel of 7,500 acres. In each of the years 1868, 1869 and 1870, the whole quarter was not assessed or taxed, and so much of it as was assessed was placed upon the roll in two parcels under a description as follows:

> Township 24, Great Tract 1, Macomb's Purchase; N. W. ¼ excepting one thousand acres lying in N. W. corner; also 1,215 acres which is water, leaving 5,285 acres.
>
> Macomb's Purchase, Great Tract 1, Township 24, 1,000 acres, lying in the northwest corner of Northwest Quarter (Record, pp. 20, 21).

(7) The Northwest Quarter of said Township 24 contains, and for more than 30 years past has contained, a part of Lower Saranac Lake, a part of Middle Saranac Lake, a part of Little Weller Pond, and a part of the Saranac river, and these are the only bodies of water which are or have been within it, and no part of either of them is within the parcel of 1,000 acres in a square form in the northwest corner. The area of so much of these bodies of water as is within the said quarter is as follows: Lower Saranac Lake (excluding islands), 905 acres; Middle Saranac Lake (excluding islands), 110 acres; Little Weller Pond, 20 acres, or a total of 1,035 acres (Record, p. 22). During the years 1866–1870 there was a dam across the outlet of the Lower Saranac Lake built to facilitate the running of logs down the Saranac river; when this dam was closed, the level of the lake was raised and from two hundred to two hundred and fifty acres of marsh land flooded (Record, p. 23).

(8) In December, 1894, the defendant caused a notice to be published once a week for three successive weeks in a newspaper published in Franklin County, of which the following is a copy:

"To whom it may concern:

"Notice is hereby given that the following is "the list of wild, vacant forest lands located in the "County of Franklin to which the State holds "title, and that from and after three weeks from "the 22d day of December, 1894, possession there- "of will be deemed to be in the Comptroller of "this State, pursuant to the provisions of section "13 of chapter 711, Laws of 1893."

WILLIAM J. MORGAN,
Deputy Comptroller.

The list attached to this notice contained the land in question (Record, pp. 16, 17).

(9) This action was begun January 29, 1895 (Record, p. 17).

When the testimony was closed counsel for both parties admitted that there was no question of fact for the jury and that the case depended upon the construction which the Court should give to the law. The jury was thereupon discharged and a stipulation filed that the issues be tried and decided by the Court without a jury, pursuant to section 649 of the Revised Statutes (Record, pp. 11, 22).

Plaintiff then asked the Court to rule upon certain propositions of law material to the case. The Court did so, disposing of most of them adversely to the plaintiff. To each of these adverse rulings plaintiff excepted. The Court thereafter made a general finding in favor of defendant on the merits (Record, p. 25).

Judgment was entered in favor of defendant, determining not only that plaintiff was not entitled to possession, but also that the State of New York was the owner in fee simple of the land in dispute.

A bill of exceptions has been made containing the propositions of law submitted to the Trial Court, the rulings thereon and the exceptions thereto, together

with so much of the evidence as is necessary to show that the propositions of law upon which rulings were asked by plaintiff had a foundation in the facts and were material to a proper disposition of the case.

It appears from the petition for the writ of error and affidavit attached that the land in dispute is worth more than $75,000 (Record, pp. 29, 30).

Specifications of Error.

I.—The Court erred in refusing to affirm the first proposition of law submitted by plaintiff, as follows:

> "*First*—Assuming that the sale by the Comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of several years, which taxes were assessed against separate and distinct parcels of the tract sold, such sale was not authorized by law in 1877; such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893."

II.—The Court erred in refusing to affirm the second proposition of law submitted by the plaintiff, as follows:

> "*Second*—Assuming that the sale by the Comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of several years, during one or more of which years a part of the tract sold was not assessed or taxed at all, such sale was not authorized by law in 1877; such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void, and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893."

III.—The Court erred in refusing to affirm the third

proposition of law submitted by the plaintiff, as follows:

> "*Third*—Assuming that the proof shows a sale by the Comptroller of a tract of land as one parcel for the aggregate unpaid taxes of several years, some of which taxes were assessed against the whole tract sold and others against a part of the tract only, such sale was not authorized by law in 1877; such mode of sale would be a jurisdictional defect in the proceedings, and a sale so made is void and is not cured or validated by chapter 448 of Laws of 1885, or chapter 711 of Laws of 1893."

IV.—The Court erred in refusing to affirm the fifth proposition of law submitted by the plaintiff, as follows:

> "*Fifth*—If the Court shall find that the sale of the land in question at the 1877 tax sale was made for the unpaid taxes of 1866, 1867, 1868, 1869 and 1870, and that the taxes for the years 1868, 1869 and 1870 as against a parcel of 5,285 acres of the tract sold were based upon an assessment of the parcel in which it was described as follows: 'Township 24, 'Great Tract, one Macomb's Purchase, Northwest $\frac{1}{4}$, 'excepting one thousand acres lying in the north-'west corner; also 1,215 acres which is water, 'leaving 5,285 acres'; and if the Court shall also find that the area of land covered by water in said Northwest Quarter, outside of the 1,000 acres in the Northwest corner was substantially more or less than 1,215 acres, then such description was not sufficient to identify the parcel assessed with reasonable certainty and the taxes based upon such assessment were void, and the sale of 1877 was also void. Such assessment was a jurisdictional defect in the proceedings, and the sale was not cured or validated by chapter 448 of the Laws of 1885, or by chapter 711 of the Laws of 1893."

V.—The Court erred in refusing to affirm the sixth proposition of law submitted by the plaintiff, as follows:

> "*Sixth*—If the Court shall find that the taxes of 1868 as against a parcel of one thousand acres of the tract sold at the 1877 sale were based upon an assessment in which said parcel was described as follows: 'Macomb's Purchase, Great Tract One, 'Township 24, northwest corner of Northwest 'Quarter 1,000 acres'; and that the taxes of 1869 and 1870 against said parcel were based upon assessments in which it was described as follows: 'Great Tract No. 1, Macomb's Purchase, Township '24; 1,000 acres, lying in the northwest corner of 'the Northwest Quarter,' then such description was not sufficient to identify the parcel assessed with reasonable certainty, and the taxes based thereon were void; and if the sale of 1877 was made for such taxes as well as the taxes of other years, such sale was also void; such assessment was a jurisdictional defect in the proceedings and the sale was not cured or validated by chapter 448 of the Laws of 1885, or by chapter 711 of the Laws of 1893."

VI.—The Court erred in refusing to affirm the seventh proposition of law submitted by the plaintiff, as follows:

> "*Seventh*—If the Court shall find that at the sale of 1881 the Comptroller treated the land in question as already the property of the State and struck the same off to the State without giving any opportunity for other persons to bid thereon, then the State acquired no title by reason of such sale, and such sale was not validated or made effectual by chapter 448 of the Laws of 1885, or by chapter 711 of the Laws of 1893."

VII.—The Court erred in refusing to affirm the

eighth proposition of law, submitted by plaintiff, as follows:

> "*Eighth*—Chapter 448 of the Laws of 1885 is unconstitutional and void and is repugnant to the Fourteenth Amendment of the Constitution of the United States."

VIII.—The Court erred in receiving in evidence the deed made by the Comptroller to the People of the State of New York in pursuance of the tax sale of 1881, dated October 31, 1884, which deed purported to convey to the People of the State of New York, two parcels of land in the Northwest Quarter of Township 24, by the following description:

> "Macomb's Purchase, Great Tract One, Township 24, Northwest Quarter, 5,285 acres, more or less, being all that remains of the said Northwest Quarters after excepting therefrom 1,000 acres in the northwest corner thereof, and 1,215 acres covered by water. 1,000 acres in the northwest corner of the Northwest Quarter"

—and in overruling the objections of plaintiff that said deed was void upon its face for uncertainty of description.

IX.—The Court erred in receiving in evidence the certificate of sale issued by the Comptroller to the People of the State of New York upon the tax sale of 1890, and in overruling the objections of the plaintiff to said certificate that it was not evidence of a conveyance of the title, but at most only evidence of an equitable title which could not be considered in an action of ejectment in this Court and that the deed of the Comptroller was the best evidence of a conveyance under the tax sale.

The questions arising under these specifications of error, may be reduced in a general way to two:

FIRST—*Is chapter* 448 *of the Laws of New York of*

1885 *a valid and constitutional law when set up by the State in its own favor?*

SECOND—*Were the defects shown to exist in the tax sales or either of them of such nature as to be beyond the reach of that law if valid, accepting the construction which has been put upon it by the New York Court?*

The act—the validity of which is in question—chapter 448 of Laws of 1885—is as follows:

LAWS 1885, CHAPTER 448.

AN ACT to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

SECTION 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller, and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment

of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

§ 2. The provisions of this act are hereby made applicable only to the following counties, namely: Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder."

It was held by this Court in the *Turner* case, following the construction given to the act by the New York courts, that this statute, "according to its principal intent and effect," was a statute of limitation (168 U.

S., 90). So, also, as construed by the New York courts, the act does not extend to tax sales void by reason of jurisdictional defects.

Joslyn *vs.* Rockwell (1891), 128 N. Y., 334.

ARGUMENT.

FIRST.

The writ of error is properly taken to this Court.

It is true that the jurisdiction of the Circuit Court was originally invoked by reason solely of the diverse citizenship of the parties, and that no claim was made by the complaint that any law of the State was unconstitutional. No such allegation could have been appropriately inserted in a complaint in ejectment. Defendant, by its answer, sought to take advantage of the limitation contained in chapter 448, Laws of 1885, thereby asserting the validity of that law (Record, p. 8).

Plaintiff met the tax titles set up by defendant by proof which showed the sales to have been void when made, thus forcing the defendant to avail himself of the limitation law of 1885. Plaintiff sought to meet this law by asking the Court to rule, *first*, that the defects proved in the tax title were of a jurisdictional nature, and therefore not within the provisions of the act; and *second*, that the act itself was repugnant to the Constitution of the United States (Record, p. 25).

The Court refused to so rule, but on the contrary held that the defects shown to exist in the tax sales were in the nature of irregularities only and therefore within the scope of the new limitation law, and that the validity of that law had been conclusively estab-

lished by the decision of this Court in *Turner* vs. *New York* (1897), 168 U. S., 90 (Record, p. 28).

It is thus evident that defendant has been successful solely by reason of the law in question, and the validity of this law was challenged upon the trial.

The case is therefore one in which a "law of a state "is claimed to be in contravention of the Constitution "of the United States," and a writ of error lies direct to this Court.

Holder *vs.* Aultman (1897), 169 U. S., 81, 88.

In such cases the jurisdiction of this Court is not limited to the constitutional question but extends to and includes the whole case and all questions in it.

Holder *vs.* Aultman (1897), 169 U. S., 81.
Scott *vs.* Donald (1896), 165 U. S., 58.

The plaintiff in error is therefore entitled to a review not only of the question as to the validity of the State law which is challenged, but also of all other questions in the case properly presented on the record.

SECOND.

The questions which we seek to review were properly raised by the exceptions taken to the refusal of the trial Judge to affirm the propositions of law submitted to him and contained in the bill of exceptions.

The case having been, in effect, tried by the Court without a jury, under section 649 of the Revised Statutes, and the Court having made a general finding, the only way in which the "construction which the Court should give to the law," upon which it was admitted the issues depended (Record, p. 23), could be brought

upon the record and saved for review, was by asking the Court to rule upon the propositions of law entering into the case, and to declare the law to be as embodied in the propositions submitted. This was done, and the requests, rulings and exceptions are brought up by the bill of exceptions (Record, pp. 23–24).

This practice is, we think, in accordance with the rules established by this Court in regard to the review of actions at law tried by the Court without a jury.

Norris *vs.* Jackson (1869), 9 Wall., 125.
Insurance Co. *vs.* Sea. (1874), 21 Wall., 158.
Martinton *vs.* Fairbanks (1884), 112 U. S., 670.
Redfield *vs.* Parks (1889), 132 U. S., 239.
St. Louis *vs.* Western Union Tel. Co. (1893), 148 U. S., 92.
St. Louis *vs.* Western Union Tel. Co. (1897), 166 U. S., 388.

In *Norris* vs. *Jackson* [1869] (9 Wall., 125) this Court laid down certain rules to govern the practice under the Act of 1865 (now sections 649 and 700 of the R. S.), allowing parties in actions at law to waive a jury and submit the whole case to the Court. One of these rules is as follows (p. 128) :

> " 3. That if the parties desire a review of the " law involved in the case, they must either get " the Court to find a special verdict, which raises " the legal propositions, or they must present to " the Court their propositions of law, and require " the Court to rule on them."

It is not possible for a party to compel special findings.

Ins. Co. *vs.* Folsom (1873), 18 Wall., 237.

The only other way in which it is possible to review the law which has gone into a general finding is by re-

quiring the Court to affirm or deny the propositions of law which are material to any state of facts shown by the evidence.

The practice adopted by the plaintiff in error to secure a review of the questions of law involved in the case was intended to be that pointed out and sanctioned by BLATCHFORD, *J.*, in *Clement* vs. *Phenix Ins. Co.* (1869), 7 Blatch., 51–53. This decision was practically contemporaneous with that of this Court in *Norris* vs. *Jackson*, 9 Wall., 125 (1869), and we think the practice sanctioned by it is that intended by this Court in the third rule enunciated by it in the *Norris* case.

In *Insurance Co.* vs. *Sea.* (1874), 21 Wall., 158, the rules of the *Norris* case were reiterated and the practice declared to have been distinctly and positively settled. It is evident from this that it was not intended by anything said in *Insurance Co.* vs. *Folsom* (1873), 18 Wall., 237, or *Cooper* vs. *Omohundro* (1873), 19 Wall., 69, to change or limit the rules of the *Norris* case. It would seem, also, to make clear that what was said by *Bradley, J.*, in *Dirst* vs. *Morris* (1871), 14 Wall., 484, 491: "As the law "stands, if a jury is waived and the Court chooses to "find generally for one side or the other, the losing "party has no redress on error, except for the wrong- "ful admission or rejection of evidence"—is not accurate as a general statement, and must be confined to cases similar to that then before the Court, in which no request for rulings on propositions of law had been made.

The practice of submitting propositions of law to the Court and excepting to adverse rulings thereon as a method of saving for review the questions of law which have gone into a general finding, has also been approved by some of the Circuit Courts of Appeal.

Mercantile Trust Co. *vs.* Wood (1894), 19 U. S. App., 568.

Walker *vs.* Miller (1894), 19 U. S. App., 403.

Nat. Bank of Commerce. *vs.* First Nat. Bk. (1894), 27 U. S. App., 88.
Searcy Co. *vs.* Thompson (1895), 27 U. S. App., 715.

THIRD.

The decision of this Court in Turner against New York, 168 U. S., 90, does not preclude further consideration of the constitutionality of the law of New York—chapter 448 of Laws of 1885—challenged upon this record.

The Turner case came before this Court on error to the State Court. Upon such a writ, the only question for the consideration of this Court is the so-called Federal question. Other questions of purely State law are not open to examination.

Murdock *vs.* Memphis (1874), 20 Wall., 590.

No limitation law is or can be valid unless while it is running the person to be affected by it has opportunity to assert his rights in some tribunal competent both to ascertain and enforce them.

Cooley, Const. Lim., 3d Ed., 366.

The question as to the validity of the law challenged in the present case must turn on whether or not during the six months allowed for that purpose the owner of the land could have asserted his right to it as against the State, in some court or tribunal competent to try such claim and whose decision would be binding on the State.

In the *Turner* case it was urged that under the laws of New York the State itself could not be sued, and that no way existed by which the title claimed by the State and about to be validated by the new limitation

law could be brought to the test of judicial investigation. This Court met the argument as follows:

> " It was argued on behalf of the plaintiff in error " that the statute was unconstitutional, because it " did not allow him any opportunity to assert " his rights, even within six months after its pas- " sage. But the statute did not take away any " right of action which he had before its passage, " but merely limited the time within which he " might assert such a right. Within the six " months, he had every remedy which he would " have had before the passage of the statute. If " he had no remedy before, the statute took none " away. From the judgments of the Court of Ap- " peals in the case at bar, and in the subsequent case " of *People* vs. *Roberts* (1897), 151 N. Y., 540, there " would appear to have been some difference of " opinion in that Court upon the question whether " his proper remedy was by direct application to " the Comptroller to cancel the sale, or by action " of ejectment against the Comptroller or the For- " est Commissioners. But as that Court has uni- " formly held that he had a remedy, it is not " for us to determine what that remedy was under " the local constitution and laws."
>
> Turner *vs.* New York (1897), 168 U. S., 90, 94.

It seems from this opinion, as we understand it, that in the Turner case the existence of a remedy in favor of the owner and against the State during the six months following the passage of that new law was treated as a question of purely State law upon which the decisions of the State Court right or wrong were final. This Court treated the question as to whether a remedy did or did not exist as foreclosed by the decisions of the State Court and held that the correctness of the decision in that respect was not open to re-

view. This view of the effect of the judgment of the State Court reduced the constitutional question to its lowest terms.

In the present case the Court is called upon to review the judgment of the Circuit Court of the United States and the whole case is here for review. The questions which, in the Turner case, were assumed to have been correctly decided because they were questions of State law, must now be decided by this Court for itself.

Miss. & Mo. Railroad Co. *vs.* McClure (1870), 10 Wall., 507, 515.

Central Land Co. *vs.* Laidley (1895), 159 U. S., 103, 111.

Fallbrook Irrigation District *vs.* Bradley (1896), 164 U. S., 112, 154.

It may be conceded that the former decision is final as regards the reasonableness of the time allowed by the new law—six months—in which the land owner was bound to assert his rights. So also it may be conceded that if this Court, upon its own examination of the law of New York shall come to the conclusion that the land owner did have an effectual remedy against the State while the new limitation law was running, in either one of the three ways suggested in the Turner case or otherwise, then the constitutional question, as now presented, will be answered by the former decision of this Court. But the question whether an effectual remedy did or did not exist must be decided by this Court for itself and not taken for granted.

We are not unmindful of the rule that this Court will in general adopt the construction which the highest court of a State has given to its own constitution and laws. As was said in *Leffingwell* vs. *Warren* (1862), 2 Black, 599, 603, this Court will follow the "latest settled adjudications." But if it shall appear that the existence of either of the remedies alleged to have existed in favor of

the land owner and against the State has never been actually adjudicated by the Court of Appeals of New York, it will then be the duty of this Court to examine the statutes upon which the claim of such remedy is based and determine for itself whether or not the claim is well founded.

Burgess *vs.* Seligman (1882), 107 U. S.. 20–33.

We submit in all confidence that an examination of the New York authorities will show—

(1) That as regards the remedy by application to the Comptroller to cancel, the New York Court of Appeals has decided both ways, but that the "latest settled adjudication" of that Court is *against* the existence of the remedy claimed.

(2) That no action of ejectment against the Forest Commission has ever been brought and decided, and of course no adjudication has ever been made either for or against the liability of that Commission to such a suit.

(3) No action of ejectment against the Comptroller was ever brought except those based upon his taking actual possession under a statute of 1885, and such possession was not taken as regards the land in question until December, 1894, and this action was begun in January, 1895 (Record, pp. 16–17).

If we are right in this, it will then be for this Court to examine the law of New York and determine whether the land-owner had any remedy which he could have asserted against the State, what that remedy was and whether it was *such* a remedy as must exist in favor of the citizen before he can be deprived of his property under cover of a limitation law.

The opinion of the Court in the *Turner* case suggests that if the land-owner had no remedy before the new limitation law was passed he lost nothing, because that statute took none away.

This suggestion seems to involve an erroneous view of the situation by the land-owner whose land had been illegally sold for taxes *prior to the passage of the limitation law.* We of course admit—we are here asserting—that in all cases in which the State was the nominal purchaser the land-owner had no remedy. *But he needed none.* An illegal tax sale is a nullity. It does not affect the title or possession of the true owner.

Johnson *vs.* Elwood (1873), 53 N. Y., 431, 434.

Thompson *vs.* Burhans (1874), 61 N. Y., 52, 67.

Clason *vs.* Baldwin (1897), 152 N. Y., 204.

Notwithstanding the formal sale and conveyance of his land to the State, the true owner remained seized in fee, entitled to the possession, and, as regards wild, vacant forest lands, legally in possession. He had, therefore, everything which the law could give him, and if he had no remedy as against the illegal and void deed he needed none.

Cooley, Const. Lim., 6th ed., p. 449 and note 3.

Groesbeck *vs.* Seeley (1865), 13 Mich., 329.

In the case last cited, CAMPBELL, *J.*, says (13 Mich., p. 343):

> "A person who has a lawful right, and is actu-
> "ally or constructively in possession, can never
> "be required to take active steps against oppos-
> "ing claims. The law does not compel any man
> "who is unassailed to pay any attention to unlaw-
> "ful pretenses which are not asserted by posses-
> "sion or suit."

Of course if the State had taken actual possession under its illegal deed, then a wrong would have been done to the owner and a remedy would at once have arisen by action against the officer or agent of the State as a trespasser and a wrongdoer. But when the new

limitation law began to operate the situation was changed. The State by this law undertook to give life to that which was born dead; to make deeds which were nullities when made, and which had remained nullties for years, valid and effectual to transfer title from the citizen to the State.

A curative and limitation law such as is now before the Court presupposes invalid and illegal deeds. Valid tax titles need no such assistance.

Pillow *vs.* Roberts (1851), 13 How., 472, 477.

The position of the land-owners became, by force of the new law, such that he must take the initiative or lose his land. The need for some remedy now became urgent. Had the State, by legislation prior or contemporary, provided that remedy? This, we submit, is the vital question in the case—a question to be decided by this Court, and which if decided in the negative must invalidate the limitation law.

FOURTH.

The act in question—chapter 448 of the Law of 1885—considered as a limitation law in favor of the State, is not valid because the land-owner had no opportunity to assert his rights against the State.

We assume the law to be a limitation law, and that the *Turner* case so decided. We also assume, without discussion, that a law shortening existing periods of limitation, or fixing a new limitation in cases where there was none, must give reasonable opportunity for the assertion of existing rights unaffected by the new law and that such opportunity requires persons to sue and to be sued, a court competent both to ascertain

and enforce their rights, and time in which to invoke its aid.

Cooley, Cons. Lim., 6th Ed., 449.

The *Turner* case established the sufficiency of the time allowed by the law now in question, but it treated the existence of a Court competent to try the disputed rights and of a person liable to be sued for that purpose as questions of State law and foreclosed by the judgment of the State Court. These things ought now to be decided and not assumed.

It is, of course, settled law that the State itself cannot be impleaded in its own Court except with its own consent manifested by express statute.

People *vs.* Dennison (1881), 84 N. Y., 272–283.
Locke *vs.* The State (1894), 140 N. Y., 480.
Meigs *vs.* Roberts (1898), 24 Miscellaneous Rep., 668.

This Court in the *Turner* case apparently contemplated three forms of procedure as existing in New York in 1885, under one of which the land owner might have asserted his title as against the State. These were:

1. Cancellation by the Comptroller.
2. Ejectment against the Forest Commission.
3. Ejectment against the Comptroller.

I.— Cancellation by the Comptroller.

It was understood by counsel when the *Turner* case was decided by the New York Court of Appeals (145 N. Y., 451), that its decision had been made to turn upon the existence of power in the Comptroller to cancel an illegal tax sale in cases in which the State itself had become the purchaser, and that in such cases the act of the Comptroller would bind the State.

GRAY, *J.*, says (145 N. Y., p. 460):

"By virtue of the Act of 1885, that opportunity
"to appear before the Comptroller and to de-
"mand the cancellation of the tax sale, because
"of irregularities in the proceedings leading to
"the sale, was continued for six months
"after the passage of the act. Differing from
"a case between the owner of lands and the
"purchaser thereof at the tax sale, where the
"Comptroller would not have the power upon the
"application of the owner to cancel a tax title, here
"the State became the owner through the pur-
"chase and it was open to the owner to come be-
"fore the Comptroller and to make proof of the
"invalidity of the sale through which the State
"derived its title. With the knowledge of the law,
"the person claiming to be the owner of the land
"sold was chargeable; and when put upon his
"inquiry, as to the result of the proceedings, he
"discovered the State to have become the pur-
"chaser, it was incumbent upon him to take affirm-
"ative steps to cancel the sale, if he would recover
"his title to the lands."

That decision was in 1895. Prior thereto the Court by a line of cases had established as a general rule that the Comptroller had no power to cancel an illegal tax sale upon the application of the owner whose lands had been sold—that such power could be exercised only at the instance and with the consent of the tax purchaser.

People *ex rel.* Wright *vs.* Chapin (1887), 104 N Y., 369.

Ostrander *vs.* Darling (1891), 127 N. Y., 70.

People *ex rel.* Hamilton Park Co. *vs.* Wemple (1893), 139 N. Y., 240.

People *ex rel.* Witte *vs.* Roberts (1894), 144 N. Y., 234.

The decision in the *Turner* case was understood to distinguish these cases and to so construe the statute relative to cancellation as to allow the Comptroller to cancel on motion of the owner *where the State itself* had become purchaser. But in the later case of *People* ex rel. *Millard* vs. *Roberts* (1897), 151 N. Y., 540, this view of the *Turner* case was denied, the Court then saying after a review of *all* the former cases (p. 543):

> "It is obvious that there was no intention to
> " modify or disturb these decisions by anything
> " that was said in the case of *People vs. Turner.*"

This was the last utterance of the New York Courts upon the subject at the time the *Turner* case was before this Court. Since then, however, the point has been passed upon in a way to remove any doubt, if doubt there could be after the decision reported in 151 N. Y.

The contest between Turner and the State was not only waged in the ordinary courts, but also before the Comptroller, and in 1891 that officer, upon proof showing the actual payment before the sale of part of the taxes for which the sale was made, cancelled and set aside that sale upon certain conditions not now material. The State, through the Forest Commission, brought certiorari to review the action of the Comptroller. The writ was first quashed upon technical grounds, but the order to that effect was reversed by the Court of Appeals and a rehearing ordered.

> People *ex rel.* Forest Commission *vs.* Campbell, 152 N. Y., 51.

This rehearing was had before the Appellate Division in November, 1897 (a month after the decision of this Court in the *Turner* case). In the opinion then rendered, PARKER, *P. J.*, says (22 App. Div., 172):

> "It is well settled that the Comptroller has no
> " jurisdiction to entertain an application on the

" part of the owner of lands sold for taxes to can-
" cel such sale on the ground of its illegality.
" There is no statute which has constituted him a
" court to decide controversies between the owner
" of lands so sold and the purchaser as to the va-
" lidity of the tax title (*People* ex rel. *Hamilton Park*
" *Co.* vs. *Wemple* (1893), 139 N. Y., 240, 245, 247;
" *People* ex rel. *Witte* vs. *Roberts* (1894), 144 N.Y., 234).
" And this is so even though the State was the pur-
" chaser and holds the title when such an applica-
" tion is made (*People* ex rel. *Millard* vs. *Roberts*
" (1897), 151 N. Y., 540). And when the Comptroller
" assumes to cancel such a sale on the application
" of the owner, his proceedings may be reviewed
" by certiorari (*People* ex rel. *Hamilton Park Co.* vs.
" *Wemple, supra*). And such review may be had
" upon the application of the Forest Commission
" (*People* ex rel. *Forest Commission* vs. *Campbell*
" [1897], 152 N. Y., 51).

"It is clear, therefore, without considering
" whether Turner, who made this application, was
" or was not the owner of the lands in question
" or whether the sale was or was not a valid one,
" that the order of Comptroller Wemple vacating
" and annulling the tax sale of 1877, and the deed
" to the State subsequently executed by reason
" thereof, and all proceedings upon which such
" order was based, were utterly without authority."

The Court, however, held that it was without power *in the certiorari proceedings* to grant conditional relief by requiring the State to refund to Turner the moneys which had been exacted from him by the Comptroller as a condition of the cancellation. It therefore again quashed the writ, leaving the State to bring an action to set aside the cancellation. Appeal was taken to the Court of Appeals, and the order quashing the writ was again reversed, the Court of Appeals holding that the

Appellate Division of the Supreme Court had power on a common-law writ of certiorari to reverse the order of the Comptroller upon such terms and conditions in regard to restitution as justice required, and a re-hearing was again ordered.

People *ex rel.* Forest Commission *vs.* Campbell (1898), 156 N. Y., 64.

In September, 1898, the matter came again before the Appellate Division and the order of the Comptroller cancelling the tax sale was finally reversed.

People *ex rel.* Forest Commission *vs.* Campbell (1898), 35 App. Div., 103.

II.—EJECTMENT AGAINST THE FOREST COMMISSION.

Upon this precise point the decisions of the New York Courts are silent. No action of ejectment against the Forest Commission has ever (so far as counsel are aware) been brought to trial in New York. The Court of Appeals of that State has therefore never had an opportunity of saying whether such action can or cannot be maintained. In the recent case of *Meigs* vs. *Roberts* (October, 1898; 24 Miscellaneous Reports, 668), the Supreme Court at Special Term held that ejectment cannot be maintained against the Comptroller notwithstanding the Acts of 1885 and 1893, authorizing that officer to take actual possession of the wild lands claimed by the State, and such possession actually taken as provided in those acts. We deny the correctness of the construction given to the act by that decision, but the general principles upon which it proceeds are well founded.

RUSSELL, *J.*, says (p. 670):

> "It is well known that no action can lie against "the State in one of its own Courts, and the auth- "ority to take from it any money or property by "judgment must be distinctly expressed and can- "not be implied (*People* vs. *Dennison* [1881], 84 "N. Y., 273). * * *

"As a matter of course the State cannot be dis-
"possessed of its property in its own Courts by
"an action in form against its servant or officer.
" * * *

"It follows, therefore, as a logical conclu-
"sion, that an action to determine the title of the
"plaintiff as against the State of New York can-
"not be maintained in the Courts of the State of
"New York unless that State has, in some manner,
"expressly given its consent to such form of pro-
"cedure."

These rules would apply with full force to any action brought against the Forest Commission.

The New York Code allows an action of ejectment to be brought against the actual occupant or in case of vacant lands against any person claiming title or exercising acts of ownership.

Code of Civil Procedure, secs. 1502, 1503, Appendix, p. 106.

In the *Turner case*, 145 N. Y., 451, the Court of Appeals said that the constructive possession which the State had acquired by force of the tax deed was made an actual possession by the powers and duties devolved upon the Forest Commission as its representative. This seems to mean that the State itself had become the actual occupant.

In People *ex rel. Forest Commission* vs. *Campbell* (1897), 152 N. Y., 51, 58, the Court said: "The possession of the Commission is the possession of the State."

It may well be questioned whether the Forest Commission, assuming it to have been clothed by the statute with a general possession of the Forest Preserve, is thereby made the "actual occupant" of such lands within the meaning of those words as used in the New York statute governing actions of ejectment.

People *vs.* Ambrecht (1859), 11 Abb. Pr., 97.

It was, of course, possible for the individual members of the Commission to have so taken possession of any given parcel of land as to have rendered themselves liable to an action as tresspassers and wrongdoers, in which case an action of ejectment might have been brought against them, but no such action could be based on possession thrust upon the Commission by operation of law. It would be a contradiction in terms to make one a wrongdoer by operation of law. The bill of exceptions, in the present case states that the defendant gave evidence tending to show that the land in question was in the actual possession of the Forest Commission (Record, page 20.)

There seems, therefore, to be two points of view from which an action of ejectment against the Forest Commission should be considered as determining whether or not a land-owner had an opportunity through such procedure to try his right to land claimed by the State: one considering such action, brought against the members of the Commission as individuals and wrongdoers; and the other, considering them as in possession by force of the statute and merely as representatives of the State.

(a) *Ejectment against the members of the Forest Commission as individuals and wrongdoers.*

It is the settled doctrine of this Court that an action of ejectment may be brought against an officer as agent of a State in actual possession of land claimed by the State, and that such officer, as agent, can defend his possession only by proving the validity of the State's title.

U. S. *vs.* Lee (1882), 106 U. S., 196.
Tindal *vs.* Wesley (1896), 167 U. S., 204.

By such an action the land-owner may recover a temporary possession of his land, and perhaps, by putting the State in a position where it must itself become the actor, compel it to submit its right, to the judgment

of the Court or give up its claim. But we contend that such an action would not afford the land-owner an opportunity of effectually asserting his right against the State, for the reason that the judgment would not be in any way binding upon the State, and that the latter, by waiting until the bar of the new limitation law had fallen, could by a new action recover back the land *solely by force of the new law.*

In *Tindal* vs. *Wesley, supra,* it is said by HARLAN, *J.* (page 223):

> "The State not being a party to the suit, the "judgment will not conclude it. Not having sub- "mitted its rights to the determination of the "Court in this case, it will be open to the "State to bring any action that may be appro- "priate to establish and protect whatever claim "it has to the premises in dispute. Its claim, if "it means to assert one, will thus be brought to "the test of the law as administered by tribunals "ordained to determine controverted rights of "property; and the record in this case will not be "evidence against it for any purpose touching the "merits of its claim."

Suppose the owner of land which had been illegally sold for taxes to the State had found, in June, 1885—immediately after the passage of the act in question—the members of the Forest Commission in actual occupation of his land and had brought ejectment against them; that upon the trial the Commission had set up the tax title claimed by the State; that facts showing the nullity of that title had then been proved, and in consequence the owner had obtained judgment for the possession of his land, and that after the six months allowed by the new law had expired the State itself sued to recover the land: What defense could the land-owner make? Plainly the judgment in his favor against the individuals comprising the

Forest Commission, would avail nothing. If he undertook to prove the facts by force of which he had ejected the Commission he would be at once met with the objection that no evidence, however persuasive, could overcome the conclusive presumption of the new law, and the Court would be bound to hold, *as it did in the Turner case*, that evidence showing illegalities in the proceedings leading up to the tax sale, or in the sale itself, was irrelevant and immaterial, and "that the sale * * * and all proceedings prior there-"to, from and including the assessment of the land "* * * were regular * * * according to the "provision of * * * all laws * * * in any "manner relating thereto by virtue of the rules of evi-"dence and limitation prescribed by chapter 448 of the "Laws of 1885" (see Record in Turner *vs.* New York, p. 12; also ruling of trial Court in that action striking out defendant's evidence, Record, p. 44).

It would be wiser for the Court to hold that a limitation law needs no precedent opportunity to render it valid than to hold that an action against the members of the Forest Commission as trespassers gave such opportunity as against the State.

(b) *Ejectment against the Forest Commission as the representative of the State.*

We assume it to be settled law that an action against an officer or agent of the State which would result in depriving it of its property, or compelling it to perform its contracts is, in effect, an action against the State itself and subject to the same rules.

Cunningham *vs.* Macon & Brunswick R. R. (1883), 109 U. S., 446.

Hagood *vs.* Southern (1886), 117 U. S., 52.

In re Ayers (1887), 123 U. S., 443.

Christian *vs.* Atlantic & N. C. R. R. (1890), 133 U. S., 233.

Adams *vs.* Bradley (1878), 5 Sawyer, 217.

Cope *vs.* Hastings (1897), 183 Penn., 300, 323.

Lowry *vs.* Thompson (1886), 25 S. C., 417.

Mills Pub. Co. *vs.* Larrabee (1889), 78 Ia., 97.

State *ex rel.* Hart *vs.* Burke (1881), 33 La. Ann., 498.

The rule which is established in New York, as well as by the decisions of this Court, was expressed by RAPALLO, *J.*, in *People* vs. *Dennison*, 84 N. Y., 272, 281, as follows:

> "No action can be sustained against the Govern-
> " ment except by its own express consent under
> " some special statute allowing it (11 How., 290).
> " * * * Authority to render a judgment against
> " the State or Government, in one of its own courts,
> " cannot be implied but must be express, nor can
> " it be claimed under general laws in which the
> " State is not named."

The question thus becomes one as to the existence and construction of some "special statute," by which the State has expressly consented that its title might be tried and decided in such an action; *i. e.*, an action against the Forest Commission.

We know of no statute which can be suggested as giving such consent except the act creating the Forest Commission itself (chap. 283 of 1885; Appendix, p. 93).

This act gave to the Commission the "care, custody, " control and superintendence of the Forest Preserve." It confers large powers as to bringing actions in the name of the State to recover lands belonging to the State, or damages for trespass upon them (section 11). It is silent as regards actions brought against them, except that section 11 contains this clause: "With the " consent of the Attorney-General and the Comptroller, " the Forest Commission may employ attorneys " and counsel to prosecute any such action, or to de-

" fend any action brought against the Commission " or any of its members or subordinates arising out " of their or his official conduct with relation to the " Forest Preserve. Any attorney or counsel so em- " ployed shall act under the direction of and in the " name of the Attorney-General. When such attorney " or counsel is not so employed, the Attorney-General " shall prosecute and defend such actions." This clause seems plainly to refer to suits based upon some act done by the Commission, its members or subordinates, and claimed to be an infringement upon private rights. It presupposes affirmative action by the Commission. It may be that if the Commission should take actual possession of land not owned by the State and eject- ment should be brought against them individually as trespassers, the clause would enable them to employ counsel at the expense of the State or to require the Attorney-General to defend them. But it is very far from being express consent on the part of the State that an action to try its title should be so brought and an agreement on its part to be bound by the judgment.

That it was not the intention of the Legislature to waive generally the exemption of the State from suit in the Courts as regards lands in the Forest Preserve seems evident from the 13th section of the act, which in express terms recognizes the exemption of the State from suit and then by appropriate and express words waives that exemption, upon certain conditions, as to an action for partition of lands held by the State in common with a citizen. As to such an action, the citizen (with the consent of the Forest Com- mission) may bring and maintain it against the State itself as a party on the record " in the same " manner as if the State were not entitled to exemp- " tion from legal proceedings." Provision is made for service of process upon the State, the procedure assimilated to that in other actions for partition, and

the judgment declared to which the State is willing to submit. Manifestly, when the Legislature of 1885 intended to waive the exemption of the State it knew how to do it; and having done it in clear, formal and express terms, as to one class of actions, the argument is a fair one that it did *not* intend to waive that exemption as to other actions.

It will no doubt be urged by the defendant that the New York Court of Appeals has already construed the act creating the Forest Commission in such way as to authorize an action of ejectment against that Commission as representing the State. We fully concede the general rule that the construction put upon a State statute by the State courts is binding upon this Court, but it is equally settled that the decisions of the State Court in order to conclude this Court, must be of such a nature that it would, by force of the rule of *stare decisis*, be binding on the State Court itself. In other words, there must be *decision* as distinguished from *dictum*.

Carroll *vs.* Carroll (1853), 16 How., 275.
Pollock *vs.* Farmers' L. & T. Co. (1895), 157 U. S., 429, 575.

In *Carroll* vs. *Carroll, supra*, this Court was reviewing a judgment of the Circuit Court for the District of Maryland in an action of ejectment brought by the heir-at-law of Carroll against his devisee. The land in question was acquired by the testator after making his will, and the question was whether it passed by it. By the common law of Maryland lands so acquired were not affected by the will. By a statute of 1850 the common-law rule was modified. Upon the argument a decision of the Maryland Court of Appeals was pressed upon the Court as a decision of the local Court, construing the statute and constituting a rule of decision for the Federal Court.

CURTIS, *J.*, said (p. 286):

"If the Court of Appeals had found it necessary "to construe a statute of that State in order to "decide upon the rights of parties subject to "its judicial control, such a decision, deliberately "made, might have been taken by this Court as a "basis on which to rest our judgment. But it "must be remembered that we are bound to decide "a question of local law, upon which the rights "of parties depend, as well as every other ques- "tion, as we find it ought to be decided. In "making the examination preparatory to this find- "ing, this Court has followed two rules, one of "which belongs to the common law, and the other "is a part of our peculiar judicial system. The "first is the maxim of the common law, *stare* "*decisis*. The second grows out of the thirty- "fourth section of the Judiciary Act, which makes "the laws of the several States the rules of decision "in trials at the common law; and inasmuch as "the States have committed to their respective ju- "diciaries the power to construe and fix the mean- "ing of the statutes passed by their legislatures, "this Court has taken such constructions as "part of the law of the State, and has admin- "istered the law as thus construed. But this rule "has grown up and been held with constant refer- "ence to the other rule, *stare decisis;* and it is only "so far and in such cases as this latter rule can "operate, that the other has any effect.

"If the construction put by the court of a State "upon one of its statutes was not a matter in judg- "ment, if it might have been decided either way "without affecting any right brought into question, "then, according to the principle of the common "law, an opinion on such a question is not a "decision. To make it so there must have been "an application of the judicial mind to the precise

"question necessary to be determined to fix the
"rights of the parties and decide to whom the
"property in contestation belongs."

Is it true then, that the New York Court of Appeals has construed the Forest Commission Law to authorize an action against the Commission to try the title of the State under such circumstances that its decisions would be binding upon that Court by force of the maxim *stare decisis?*

The only cases of which we are aware which can be cited as involving a construction of the Forest Commission Law are *People* vs. *Turner* (1895), 145 N. Y., 451; *People* ex rel. *Millard* vs. *Roberts* (1897), 151 N. Y., 540, and *People* ex rel. *Forest Commission* vs. *Campbell* (1897), 152 N. Y., 51.

So far as anything was said in the *Turner* case relating to the Forest Commission, it was only to the effect that the creation of that body put the State in actual possession through the commissioners as its representatives.

In *People* ex rel. *Millard* vs. *Roberts* (1897), 151 N. Y., 540, O'BRIEN, *J.*, says (p. 543):

"If the sale is invalid, his title" (the owner's)
"is not affected, and he may keep and defend his
"possession, or, if put out of possession, he may
"regain it by action of ejectment."

The proceeding in which these words were used was a writ of certiorari to review the action of the Comptroller in refusing to cancel an alleged illegal tax sale under the authority conferred upon him by the Act of 1855, sections 83 and 85, and the acts amendatory (Appendix, pp. 59, 60). The judgment of the Court was based upon its own prior decisions. The Forest Commission was not a party. No reference was made to the act creating it. It is not easy to see how the question of the right to maintain ejectment against that commission could have

entered into the case or had any bearing upon the only question then before the Court, namely, the power of the Comptroller to cancel. There was plainly nothing in the case to require an application of the judicial mind to the question whether or not the act creating the Forest Commission authorized ejectment against that Board.

The remarks of the learned Judge, while entirely *obiter*, were accurate enough as regards controversies between individuals, and we do not believe it was intended, even by the judge who used them, to suggest that the State had consented to be sued in ejectment.

The case of *People* ex rel. *Forest Commission* vs. *Campbell* (1897), 152 N. Y., 51, is equally remote from the point: That also was a writ of certiorari to review the action of the Comptroller in granting an application made by the owner of the land to cancel an illegal sale. The writ had been quashed by the Supreme Court on the specific ground "that the relator, The "Forest Commission, has no power or authority in a "case like this to obtain or prosecute such writ." It is the settled law of New York that an order simply quashing a writ of certiorari is discretionary, and not reviewable in the Court of Appeals; but in this case, the Supreme Court having denied its own power to entertain the writ at the instance of the Forest Commission, a question of law was presented, which could be reviewed. This was the only question in the case, and the decision is authority only for the proposition that the Forest Commission is authorized to represent the State as plaintiff; that it may sue on behalf of and in the name of the State; but *suing* is one thing—being *sued* is another and a different thing. An ordinary agent or attorney in fact may cause suit to be brought in the name and on behalf of the principal, but no one would think of suing him as and for his principal. It is true the Court in its opinion says (152 N. Y., 58):

"The act clearly contemplates not only actions "brought by the Commission in the name of the "State, but actions against the Commission or "any of its members or subordinates arising out "of their official action. It is difficult, when we "consider these sweeping provisions, to believe "that it was not the intention of the Legislature "to clothe the Commission with the amplest and "most complete powers to represent the State in "the Forest Preserve."

Granting that the act contemplates actions against the Commission, its members and subordinates, the question remains, what actions? Actions which may be brought without any consent from the State—which are not in form or effect against the State; or actions which can only be maintained in pursuance of the express authority of the Legislature; actions which are either in form or in substance against the State itself? It may be that power given to a State official to employ counsel to defend himself against attack based on his official action is *express authority* from the Legislature to sue the State through that official, and a waiver of the State's exemption from suit; but we submit in all confidence that the New York Court of Appeals has not yet so decided. If such an action were brought against the Forest Commission, and sought to be maintained by reference to the words above quoted, the Court of Appeals would be prompt to say, as in a recent case it has said:

"It was not our intention to decide any case "but the one before us, which simply involved the "standing of the plaintiff to make the application "in question, and our opinion should be read in "the light of that purpose. If, as sometimes hap-"pens, broader statements were made by way of "argument or otherwise than were essential to the "decision of the questions presented, they are the

" *dicta* of the writer of the opinion and not the " decision of the Court. A judicial opinion, like " evidence, is only binding so far as it is relevant, " and when it wanders from the point at issue it " no longer has force as an official utterance."

Colonial City Traction Co. *vs.* Kingston R. R. Co. (1897), 154 N. Y., 493, 495.

See, also, Stokes *vs.* Stokes (1898), 155 N. Y., 581, 594.

III.—EJECTMENT AGAINST THE COMPTROLLER.

This is the remedy which we are seeking to assert in this action.

It rests upon a statute of 1885—chapter 453—which in a partial revision of New York statutes in regard to taxation became section 13 of chapter 711 of Laws of 1893 (Appendix, pp. 86, 104).

" Sec. 93. From and after the advertisement, once " a week for three successive weeks, of a list of " wild, vacant or forest lands, to which the state " holds title from a tax sale or otherwise, in one or " more newspapers to be selected by the comp- " troller, published in the county in which such " lands may be located, all of such wild, vacant or " forest lands shall be deemed, and are hereby " declared to be, in the actual possession of the " comptroller of this state; and such possession " shall be deemed to continue until he has been " dispossessed by the judgment of a competent " tribunal."

This statute was passed on the same day as the six months limitation law—June 9, 1885. It was plainly intended to furnish a remedy to the land owner as against the State during the running of the new limitation law. It is equally plain that such remedy did not exist until the Comptroller acted and published the notice required. This he did not do until December,

1894 (Record, p. 16). This action was begun immediately thereafter (Record, p. 17).

FIFTH.

The defects shown to exist in the tax sales were jurisdictionnl and beyond the reach of the Act of 1885, assuming it to be valid.

The act in question—chapter 448 of 1885, revised as chapter 711 of 1893, section 12—does not attempt to cure "jurisdictional defects." A tax sale void by reason of such defect remains void notwithstanding the statute.

Ensign *vs.* Barse (1887), 107 N. Y., 329.
Joslyn *vs.* Rockwell (1891), 128 N. Y., 334.
People *vs.* Turner (1895), 145 N. Y., 451.
Ne-ha-sa-ne Park Assn. *vs.* Lloyd (1896), 7 App. Div., 359.
Marsh *vs.* Ne-ha-sa-ne Park Assn. (1896), 18 Misc., 314; reversed, 25 App. Div., 34.

In the revision of 1893, the qualification or limitation which had been read into the Act of 1885 by the Court was recognized and expressed in words leaving past tax sales open to attack by reason of "any defect in the proceedings affecting the jurisdiction upon constitutional grounds" (see chap. 711 of 1893, sec. 12, Appendix, p. 104).

The New York cases do not define with any accuracy the meaning of the term "jurisdictional defect."

In *Ensign* v. *Barse* (1887), 107 N. Y., 329, a statute intended to validate tax sales in two counties of the State only was before the Court of Appeals.

FINCH, *J.*, says (p. 337):

> "The counsel on both sides agree as to the "legitimate range of a curative statute. They

"agree that a retrospective statute curing defects "in a legal proceeding where they are in "their nature irregularities only and do not "extend to matters of jurisdiction, is not void "on constitutional grounds; that if the thing "wanting or omitted, which constitutes the defect "is something, the necessity for which the Legis- "lature might have dispensed with by prior "statutes, or if something has been done or done "in a particular way which the Legislature might "have made immaterial, the omission or irregular "act may be cured by a subsequent statute. We "see no reason to disagree with the counsel in "this general statement of the law, at least for "present purposes, though it may not be above "criticism or beyond exception. The act of 1882 "does not on its face purport to cure jurisdictional "defects. It raises a conclusive presumption of "regularity, but leaves the question of the assessor's "jurisdiction and authority unaffected. * * * "We should, therefore, disregard such defects "in the proceedings as are not jurisdictional, but "founded upon acts or omissions wholly within "the power of the Legislature to have dispensed "with or treated as immaterial."

It was evidently intended by the Court to adopt the rule enunciated by Judge Cooley, and approved by this Court, with reference to *inchoate tax proceedings*, in *Mattingly* vs. *District of Columbia* (1878), 97 U. S., 687.

In *Joslyn* vs. *Rockwell* (1891), 128 N. Y., 334, it was held that the Act of 1885—the act now under consideration—was not different in its essential features from that passed upon in *Ensign* vs. *Barse*, and it was accordingly held that the assessment as non-resident of lands actually occupied was a "jurisdictional defect," which the Statute of 1885 did not cure.

In *People* vs. *Turner* (1895), 145 N. Y., 451, the construc-

tion given the statute in *Joslyn* vs. *Rockwell* was approved. It is, therefore, settled law that the Act of 1885 does not extend to tax sales which were void by reason of any jurisdictional defect in the proceedings.

In the present case the following defects were, we claim, of a jurisdictional nature:

1. *The sale of the whole tract of land in question for the aggregate unpaid taxes of several years, when during one or more of those years a part of the tract sold was not assessed or taxed at all.*

2. *The sale as one tract of two or more parcels separately assessed.*

3. *The assessment of taxes by a description so uncertain as not to identify the parcel of land taxed.*

4. *Treating the land on the sale as already the property of the State and denying opportunity for competitive bidding.*

The first two of these defects are so far similar that they may be considered together.

I.

The sale in 1877 of the whole quarter as one tract for the aggregate taxes of 1866, 1867, 1868, 1869 and 1870 when the taxes of 1868, 1869 and 1870 were assessed against two separate and distinct parcels of the quarter, while another parcel of the quarter was not assessed or taxed at all, was illegal and void, and such mode of sale was a jurisdictional defect.

The bill of exceptions shows that, after defendant had given in evidence the deed based on the tax sale of 1877, plaintiff, in rebuttal, proved that at the tax sale of 1877 the whole quarter, containing 7,500 acres, was

sold as one parcel for the aggregate unpaid taxes of 1866–1870, inclusive, amounting, with interest and costs, to $2,756.40; that the taxes of 1866 and 1867 were levied upon the whole quarter as a single and distinct tract of land; that in each of the years 1868, 1869 and 1870 the whole quarter was not assessed or taxed; that so much as was assessed consisted of two parcels, one containing 5,285 acres and described as the N. W. ¼ of Township 24 "excepting 1,000 acres "lying in the northwest corner; also 1,215 acres which "is water, leaving 5,285 acres"; the other parcel described as "1,000 acres lying in the northwest corner "of the northwest quarter." The balance of the quarter, 1,215 acres, was not assessed or taxed in either of the years 1868, 1869, 1870 (Record, p. 20, 21).

The plaintiff requested the Court to rule as matter of law material to these facts:

First—Assuming that the sale by the Comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of several years, which taxes were assessed against separate and distinct parcels of the tract sold, such sale was not authorized by law in 1877. Such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void, and is not cured or validated by chapter 448 of the Laws of 1885 or chapter 711 of the Laws of 1893.

The Court refused to so rule, and plaintiff excepted.

Second—Assuming that the sale by the Comptroller of the tract of land in controversy was made as one parcel for the aggregate unpaid taxes of several years, during one or more of which years a part of the land sold was not assessed or taxed at all, such sale was not authorized by law in 1877; such mode of sale is a jurisdictional defect in the proceedings, and a sale so made is void, and is not cured or val-

idated by chapter 448 of Laws of 1885 or chapter 711 of Laws of 1893.

The Court refused to so rule, and plaintiff excepted.

Third—Assuming that the proof shows a sale by the Comptroller of a tract of land as one parcel for the aggregate unpaid taxes of several years, some of which taxes were assessed against the whole tract sold and others against a part of the tract only, such sale was not authorized by law in 1877; such mode of sale would be a jurisdictional defect in the proceedings, and a sale so made is void, and is not cured or validated by chapter 448 of Laws of 1885 or chapter 711 of Laws of 1893.

The Court refused to so rule, and plaintiff excepted.

Record, pp. 23, 24.

Error is assigned upon each of these refusals.

Record, pp. 32, 33.

It is one of the axioms of tax law that land can only be sold for taxes which it is legally liable to pay.

Black on Tax Titles, 2d ed., sec. 228.

In the present case the 1,215-acre parcel which was excepted from the assessment, and consequently not taxed at all in the years 1868, 1869 and 1870, was sold with the other lands to pay the taxes of those years. It is manifest that the 1,215-acre parcel owed the State nothing as regards those taxes, and, of course, could not be sold for their non-payment.

A sale of land for taxes must, we think, be wholly good or wholly bad. It is indivisible, and unless it can be sustained as a whole it cannot be sustained in part. It is also manifest that the sale of the 1,215-acre parcel for the unpaid taxes of five years cannot, *independently*

of curative legislation, be justified because as to two of those years it was legally liable.

People *vs.* Hagadorn (1887), 104 N. Y., 516.

It follows, therefore, that the sale of the whole quarter in 1877 for taxes which were not a lien upon the whole quarter was illegal and void. It is not different in principle from the case of the assessment of an entire tract followed by payment of a proportionate part of the tax upon a specific part of the land and a sale of the entire tract for the unpaid balance. Such a sale is void *in toto*.

Black on Tax Titles, 2d ed., sec. 258.

Marsh *vs.* Ne-ha-sa-ne Park Association (1896), 18 Misc., 314; Reversed, 25 App. Div., 34.

The rule upon this point is thus stated by Mr. Black:

> "As a general rule, the whole of a tract of land "against which taxes are assessed in gross must "be sold for non-payment of such taxes. But "the statutes sometimes permit the owner of a "specified and determinate fraction of the tract (or "even, in some cases, of an undivided interest in "it) to discharge the tax lien as respects that "portion by paying a proportionate share of the "gross tax. When advantage is taken of such a "provision, a sale ef the entire tract for taxes "assessed upon the whole, after the taxes have "been paid upon a part of it, is void and passes "no title."

So also the action of the Comptroller in selling as one parcel two or more parcels which had been separately assessed and taxed, was wholly illegal, and rendered the sale null and void when it was made.

The general rule in regard to the sale of lands for unpaid taxes is that such sale must be made as the

land has been assessed and taxed, and the practice of bunching into one parcel two or more lots which have been separately assessed, and selling them as one for the aggregate tax, has been uniformly condemned.

In Blackwell on Tax Titles, 5th edition, section 526, it is said:

> "A sale of several distinct parcels or subdi-
> "visions of land, separately assessed or in fact
> "distinct, *en masse*, and for a gross sum, is void."

In Cooley on Taxation the rule is expressed as follows (2d ed., p. 493):

> "The sale should also be made of the parcels of
> "land as they appear in the list. * * * To
> "group lands in the sale which are assessed as sepa-
> "rate interests is incompetent, even though they
> "be owned by the same person. Each parcel is
> "chargeable with its own taxes, and is to be re-
> "deemed by paying them; but such a joint sale
> "charges it with the tax upon the other also, and
> "is like issuing one execution upon several judg-
> "ments, and selling jointly the lands which are
> "charged with separate liens. It may or may not
> "be important to the owner that he have the op-
> "portunity of a separate redemption, but the fact
> "that it possibly may be so is sufficient reason
> "why the law should protect the right."

The statute of this State in pursuance of which the sale was made expresses the same rule:

> "On the day mentioned in the notices, the
> "comptroller shall commence the sale of such
> "lands, and shall continue the same from day to
> "day, until so much of each parcel so assessed,
> "shall be sold, as will be sufficient to pay the
> "taxes, interest and charges thereon."
>
> Chap. 427, Laws of 1855, sec. 44; Appendix, p. .

This statute has been four times before the courts of the State.

National Fire Ins. Co. *vs.* McKay (1867), 5 Abb. Pr., N. S., 445.
Thompson *vs.* Burhans (1874), 61 N. Y., 52.
Turner *vs.* Boyce (1895), 11 Misc., 502.
Marsh *vs.* Ne-ha-sa-ne Park Association (1896), 18 Misc., 314; Reversed, 25 App. Div., 34.

In *National Fire Ins. Co.* vs. *McKay* (1867), 5 Abb. Pr. N. S., 445, the validity of a tax sale of land in Buffalo was before the General Term of the Superior Court of that city. The facts were these: In 1837 a lot of land forty-two feet front by seventy feet deep was assessed and the tax not paid. In 1840 the lot was assessed as forty feet front. In 1852 the Comptroller sold the lot as forty-two feet front for the aggreate taxes of 1837 and 1840.

MASTEN, *J.* (p. 448):

"By the statute, as I read it, the Comptroller is "to put up for sale each parcel of the land assessed "for the amount of the taxes, interest and charges "upon it, and to strike off to the bidder who offers "to take the smallest portion of the parcel and pay "such amount, the portion so offered to be taken. "By the course pursued in this case, the forty-two "feet front by seventy feet deep not chargeable "with the tax of 1840 were sold for it. And the forty "feet by seventy feet were sold for the tax which "was chargeable upon it and other lands. This, "I think, was erroneous. By reference to the "provisions in the same article of the statute, it "will be seen that this is material as affecting the "amount to be paid upon redemption. To redeem "the whole of the lands sold, the purchase money "and interest are to be paid. To redeem any "specific part of the lands sold, such proportion

" of the purchase money and interest is to be
" paid as the quantity sought to be redeemed
" bears to the whole quantity sold. In the case
" under consideration, the whole forty-two feet
" by seventy feet were sold. To redeem the two
" feet by seventy feet, there would have to be paid
" two forty-two parts of the tax of 1840, and the
" interest, etc., and which were not chargeable
" upon them."

In *Thompson* vs. *Burhans* (1874), 61 N. Y., 52, the question came before the Commission of Appeals. The land there in controversy was 4,000 acres in the north part of Township 47, Totten & Crossfield's Purchase. The plaintiff claimed under a Comptroller's deed based on the tax sale of 1834 for taxes of 1828 and 1830.

In 1828 the township was assessed as twenty-four lots of 1,000 acres each. In 1830 it was assessed in four quarters of 6,300 acres each.

The Comptroller sold the four quarters of the township separately for the taxes of both years, charging each quarter with one-fourth of the entire tax of 1828.

EARL, *C.*, says (p. 64):

" The statute (1 R. S., p. 408, sec. 52) provides
" that whenever any tax charged on lands returned
" to the Comptroller shall remain unpaid for two
" years, he shall proceed to advertise and sell such
" land. He must advertise and sell the land by
" lots, and descriptions, as returned to him; section
" 63 provides that on the day of sale he shall sell
" so much of each parcel assessed as will be suffi-
" cient to pay the taxes, interest and charges; and
" a subsequent section provides, that if no person
" shall bid the sum required, he shall bid in the
" land for the State. On the day of this sale the
" Comptroller proceeded to sell and sold the whole
" township in four undivided quarters, separately,
" for the tax of both years, claiming the same

" amount of tax to be due on each quarter, to wit,
" the sum of $24.77, and yet the tax of 1828 was
" assessed upon twenty-four separate lots of 1,000
" acres each, and the tax was not the same upon
" each lot. The sale for the tax of 1828 could not
" be made in quarters, but should have been made
" in lots, as assessed."

In *Turner* vs. *Boyce* (1895), 11 Misc., 502, the question was squarely presented. Lot 86, except northwest quarter, was sold in 1877 for the taxes of 1861 to 1870 inclusive. The taxes of each of those years, except 1862 and 1870, were assessed against the three-quarters of the lot sold. In 1862 the east half only was assessed and returned unpaid. In 1870 the south half was assessed as one parcel, and the northeast quarter was assessed as another and separate parcel.

The sale of the three-quarters of the lot as one parcel was held to be illegal and invalid.

KELLOGG, *J.*, says (p. 505):

" The whole scheme of taxation and collection
" of taxes is based upon plain, sound principles.
" It cannot be reasoned from any language of the
" law, or by any implication to be drawn from such
" language, that parcels of land separately assessed
" and separately taxed may be bunched with other
" parcels and sold in lump. Much less does the
" law authorize such a sale where it is apparent
" that such a sale makes one parcel stand for the
" taxes levied only upon other parcels. * * *
" It is a violation of the plain principle that one
" man's land cannot be sold to pay the taxes upon
" another's, or, which is the same thing, one parcel
" of land cannot be sold to discharge a tax upon
" another parcel, no matter how small that tax may
" be."

The facts of the case now under examination furnish an excellent illustration of the injustice that would be

done to the land-owner if such a mode of sale were sanctioned by law.

The statute under which lands are sold for taxes provides that any person claiming a specific part of any tract sold may redeem that part by paying such proportion of the purchase money and interest as the number of acres sought to be redeemed shall bear to the whole number of acres sold (chap. 427 of Laws of 1855, sec. 53; Appendix, p. 50). It does not appear by the bill of exceptions whether the different parcels of the land sold were all owned by the same person at the time the taxes were unpaid and the sale had. It is manifest that the ownership might be different, and even if not, the owner might redeem one parcel and not the other. The owner of the 1,215 acres of land under water had the right to redeem that parcel from the sale, but the statute required him to pay that proportion of the amount for which the sale had been made which the number of acres in that parcel bore to the whole number of acres sold, or in this case 16 2/10 per cent.

The whole quarter was sold for $1,484.59, exclusive of interest and costs. Hence the amount to be paid on redemption of the 1,215 acres would have been $240.50 (1,484.59 × .162 = $240.50). But this parcel was not taxed at all in 1868, 1869 or 1870, and had the land been sold as assessed, this parcel would have contributed to the taxes of 1866 and 1867 only. The taxes of these two years were $806.25, and the amount which would have been paid on redemption would have been $130.61 ($806.25 × .162 = $130.61).

It remains to be considered whether the action of the Comptroller in selling the whole quarter as one parcel to enforce payment of the aggregate of all taxes levied against the different parcels, and in selling the 1,215-acre parcel for the taxes of 1868, 1869 and 1870, which were imposed on the other portion of the quarter only, constituted a jurisdictional defect in the proceedings.

Could the Legislature, by prior enactment, *all other*

provisions of law remaining as they are, have authorized such procedure?

The New York Court of Appeals in *Ensign* vs. *Barse* (1887), 107 N.Y., 329, 338, while accepting for the purpose of that case the rule that the Legislature might, by a retroactive law, cure any defect of ommission or commission which it might have authorized prospectively, at the same time suggested that the rule would be found, on closer examination, to require qualification or limitation. It would seem to be a proper and necessary limitation upon that rule that the result of the retroactive law shall not be to impose upon the land-owner a burden different from and greater than *that of which he was notified during the pendency of the tax proceedings.* If it does, and to that extent deprives him of property without an opportunity to be heard, its validity may well be questioned.

It is to be borne in mind that tax proceedings against non-resident lands are *in rem*, and do not in form deal with the owner, at the same time it is the owner who in the end must pay or lose his property; and the statute of New York recognizes very clearly that what is one parcel of non-resident land as regards taxation, may be in fact the subject of divided ownership (see chap. 427 of Laws of 1855, secs. 51-56; Appendix, pp. 49, 50).

We take it to be settled law that the constitutionality of a statute is to be tested not so much by what *is* done as by what *may be done* under it (Stuart *vs.* Palmer (1878), 74 N. Y., 183; Colon *vs.* Lisk (1897), 153 N. Y., 188, 194). The present record is silent as to the actual ownership of the different parcels of the quarter in question during the years 1866-1870, but plainly they might have been the subject of separate ownership.

If the procedure adopted at the 1877 sale of selling *en masse* was authorized in case of a single ownership, it would be equally authorized in case the ownership was

divided, for the tax law contains no machinery to enable the officer selling to ascertain the owners.

The owner of the 1,215-acre parcel knew that this parcel of land owed the State nothing for the taxes of 1868, 1869 and 1870, but that parcel did owe the State its proportion of the taxes of 1866 and 1867 imposed on the whole quarter. Existing laws, however, required that any sale of the whole quarter should be confined to the taxes imposed on the whole, and those laws also gave to the land-owner the right of paying the tax, through redemption at any time within two years of a sale on paying ten per cent. interest and costs (chap. 427 of 1855, secs. 44, 50, 53 ; Appendix, pp. 47, 49, 50).

It is manifest that until the sale by the Comptroller no claim had been made by the State for taxes of 1868, 1869 or 1870 as against the 1,215-acre parcel. It had been intentionally excepted by the taxing officers, and upon its exemption from such taxes the owner had a right to rely. But by the mode of sale adopted by the Comptroller, in connection with existing laws, this parcel of land was charged with a part of the tax of those years unpaid on other lands, for it was only on condition of such payment that he could redeem. No notice had been given to him at any stage of the proceedings that this parcel of land would be called on to make such payments. It is true the owner knew, or was bound to know, that his parcel of 1,215 acres must contribute to the taxes of 1866 and 1867. It may very well be that as to the assessment for those years the owner was content, while as to 1868, 1869 and 1870 the valuation was unfair and oppressive, but such unfair assessment did not concern him because he was not affected by it—his lands were excepted.

At what stage of the proceedings, therefore, was the owner of the 1,215-acre parcel notified of a claim against his property for taxes of 1868, 1869 and 1870, and given an opportunity to be heard as to the amount of such claim? The ordinary notices did not concern

him, for he was at the same time notified that his land was excepted. The Comptroller's notice of sale did not concern him for he had a right to assume that that officer would do his duty and sell as directed by the law; and further, the Comptroller has no power whatever as regards the amount of the tax—he can no more change the amount of a tax returned to him than a sheriff can change the figures in his execution. The Comptroller may reject a tax entirely, but if he accept it and proceed to enforce it he must enforce it as returned to him.

It may be said that the owner of the 1,215 acres might have saved his property even after the sale by redeeming. Such a remedy, as was said by the New York Court of Appeals in *Stewart* vs. *Crysler* (1885), 100 N. Y., 378-384, "only tended to enforce and perpetuate the wrong," and such remedy was granted only on condition of contributing to taxes the correctness of which he had had no opportunity to question.

We are not unmindful of the fact that the Appellate Division of the Supreme Court of New York has recently held in *Marsh* vs. *Ne-ha-sa-ne Park Association* (1898), 25 App. Div., 34, that where taxes had been assessed against a tract of land for four years and the taxes for two of those years actually paid as against a part of the tract, and the whole tract sold for the unpaid balance of all the taxes, the defect was not jurisdictional, but was cured by the Act of 1885. This decision was made by a divided court, which reversed that of the trial Court. The prevailing opinion proceeds upon the ground that because certain taxes existed for which a sale might lawfully be made, therefore there was jurisdiction to sell the land for other and different taxes—taxes for which the land was in no way liable—simply by tacking them onto those taxes for which it was liable, and calling it a merely irregular sale. We can only deny this doc-

trine and insist that the dissenting opinion is the correct law.

PUTNAM, *J.*, dissenting, says (p. 49):

"The Comptroller had a right to sell the North-
" east quarter for the taxes of 1838 and 1839, but
" not for those of 1836 and 1837, which had been
" paid on said premises, but remained unpaid on
" other portions of the township, and under the
" law was a lien on *the balance of the township*
" *only*. Such being the situation in 1843, could the
" Legislature previous to the sale have author-
" ized the Comptroller to sell the plaintiff's land
" for taxes he did not owe—for the taxes charged
" against the land of another party? It does not
" require any argument or citation of authority to
" show that the Legislature had no such power.
" The owner of the Northeast quarter had paid
" his taxes for 1836 and 1837 under the provisions of
" the existing law. The Legislature could not have
" authorized the Comptroller to sell the lands of
" such owner for another man's taxes. Had it
" attempted to authorize such a procedure, its
" action would have been a violation of the consti-
" tutional rights secured to the owner of the
" land."

In the present case the owner of the 1,215-acre parcel stands in the same position as the owner who had paid taxes in the Ne-ha-sa-ne Park case. In the one case the land was relieved from liability to sale by payment: in the other, it was not liable because never taxed. But in both cases land has been sold for taxes which it did not owe and was not liable to pay. In other words, a land-owner has been compelled to pay, through the sale of his property, taxes which he had no opportunity to contest before the sale,—taxes which he was never notified would be enforced against his property, and in which, up to the moment of sale, he

had no interest or concern, because they were not imposed upon him or his property. Since, then, the result of validating the sale of 1877 would be to compel the payment of a tax out of property not originally liable to pay it, and this, without notice to the owner, that such charge upon his property was contemplated, it follows that any law authorizing such result would be unconstitutional as not due process of law.

Winona & St. Peter Land Co. *vs.* Minnesota (1895), 159 U. S., 526, 537.

In the case cited BREWER, *J.* says (p. 537):

> "Questions of this kind have been repeatedly
> "before this Court, and the rule in respect thereto
> "often declared. That rule is that a law authoriz-
> "ing the imposition of a tax or assessment upon
> "property according to its value does not infringe
> "that provision of the Fourteenth Amendment to
> "the Constitution, which declares that no State
> "shall deprive any person of property without
> "due process of law, if the owner has an oppor-
> "tunity to question the validity or the amount of
> "it either before that amount is determined or in
> "subsequent proceedings for its collection."

Applying this rule to the present case, at what stage of the proceedings did the owner of the 1,215-acre parcel of land covered by water have an opportunity of showing that such parcel was not equal in value, acre for acre, to that portion of the township covered with timber? Had he sought to raise such question before the assessors or the Board of Supervisors, the short answer would have been that it did not concern him, as his land was wholly excepted. Neither the collector nor the Comptroller had any power to change valuations or correct assessments. Had the Comptroller obeyed the law in making the sale the owner would never have had an interest in the question, for he would never have been called upon to

pay anything toward the taxes of the three years for which his land was not assessed. But in the end, and when it was too late to question the assessment, the owner of the untaxed parcel finds it sold in such manner and form that he must either lose it entirely or contribute to taxes never levied against his land and upon a basis of value to which he never even by silence consented. So also the owner of the 1,000-acre parcel in the northwest corner of the quarter was never notified in any way that his property would be called upon to contribute to the tax upon the 5,285-acre parcel, and this upon the basis of relatively equal value. It may be that in this particular case the owner of the 1,000-acre parcel might have redeemed from the unlawful sale for less than the amount of the taxes lawfully imposed upon that parcel, and that it was the State which was prejudiced by the illegal sale. But it is manifest that this is merely an accident and that conditions might be such that the sale of separate parcels *en masse* should impose serious burdens upon the owner of one of these parcels, as in this case it did with reference to the 1,215-acre parcel. In fact such mode of sale practically nullifies the objects for which the law secures to the owner opportunity to be heard as regards his own assessment, by compelling him in the end to come in on substantially the same basis as the owners of the other parcels of the tract whose assessments have been all wrong in the beginning, but which at that time did not concern him. It may be said that the owner may prevent all this by paying his tax when due. But the State in putting the tax upon him allowed him until the expiration of the time to redeem in which to pay, charging him with 10 per cent. interest if he elected to accept the credit. After he had elected to take the time allowed by law and pay for the privilege the State had no right to change the principal amount of his indebtedness without notice to him. But this is what it does if by

retroactive legislation it sanctions the mode of sale adopted in this case.

It follows, we contend, that the act of the Comptroller in selling the whole quarter for the unpaid taxes of five years when as to three of those years a portion of that quarter had not been taxed at all, was a jurisdictional defect in the proceedings, and the Trial Court erred in refusing the second request submitted by the plaintiff (Record, pp. 23, 24). And the second assignment of error is well taken (Record, p. 32).

So also the Court erred in refusing to rule that the sale as one parcel of what had been assessed and taxed as separate parcels was also a jurisdictional defect. And the first and third assignments of error are well taken (Record, pp. 32, 33).

II.

The taxes of 1868, 1869 and 1870 were based upon a description wholly insufficient to identify the land sought to be taxed, and such uncertainty of description was a jurisdictional defect in the proceedings.

The Trial Court, at the request of the plaintiff, did rule that

> " An assessment of non-resident land for taxa-
> " tion must describe the land to be taxed, so that
> " the parcel taxed can be identified and distin-
> " guished, and a failure to so describe the land to
> " be taxed is a jurisdictional defect in the proceed-
> " ings and if the land be sold by the Comp-
> " troller to enforce payment of taxes so assessed,
> " the sale is void and is not cured or validated by
> " chapter 448 of the Laws of 1885, or chapter 711
> " of the Laws of 1893 " (Record, p. 24).

The Trial Court, however, refused to hold that the description used in levying the taxes of 1868, 1869 and

1870 was insufficient to identify the parcel taxed, and to this refusal exception was duly taken (Record, p. 24).

The question comes into the case in this way. The local authorities in those years treated the Northwest Quarter of the Township—the tract in question—as made up of three separate and distinct parcels. Namely, a parcel of 1,000 acres in the northwest corner, a parcel of 1,215 acres of water, and a parcel of 5,285 acres, described as "Township 24, Great Tract 1, "Macomb's Purchase, N. W. ¼, excepting 1,000 acres "lying in the N. W. corner; also, 1,215 acres which is "water, leaving 5,285 acres" (Record, p. 21).

Upon the trial the plaintiff gave evidence tending to show that the area of land covered by water in the quarter, exclusive of 1,000 acres in a square form in the northwest corner, was materially less than 1,215 acres, or 1,035 acres; the defendant gave evidence to show that such area was materially greater than 1,215 acres, being 1,284 acres.

Under these circumstances, plaintiff asked the Court to rule that if it should find "that the area of land "covered by water in the northwest quarter, outside "of the 1,000 acres in the northwest corner, was sub-"stantially more or less than 1,215 acres, then such "description was not sufficient to identify the parcel "assessed with reasonable certainty, and the taxes "based upon such assessment were void and the sale "of 1877 was also void. Such assessment was a "jurisdictional defect in the proceedings and the sale "was not cured or validated by chapter 448 of Laws "of 1885, or chapter 711 of Laws of 1893." The Court refused to so rule and plaintiff excepted (Record, p. 24).

Taking this refusal in connection with the previous ruling, to the effect that uncertainty of description was a jurisdictional defect, and it is plain that the Court was of opinion that the description challenged in the case was a sufficient description.

Inasmuch, therefore, as uncertainty of description was assumed to be a jurisdictional defect, but the description actually used held sufficient, it remains to consider the ruling in this latter aspect.

There are some propositions of law relating to the description of property in tax proceedings which are well settled.

(1) Certainty of description is indispensable, in all proceedings to divest the title of a citizen for non-payment of taxes or otherwise *in invitum*.

Tallman *vs.* White (1848), 2 N. Y., 66–70.
Matter of N. Y. C. & H. R. R. R. (1877), 70 N. Y., 191.
Matter of N. Y. C. & H. R. R. R. (1882) 90, N. Y., 342.
Zink *vs.* McManus (1890), 121 N. Y., 259.

(2) The rule requiring certainty of description applies with peculiar force to the assessment-roll as that is the foundation on which all the proceedings to levy and enforce a tax must rest.

Blackwell on Tax Titles, 5th ed., sec. 224.
Black on Tax Titles, 2d ed., sec. 112.
Stout *vs.* Mastin (1891), 139 U. S., 151.
Tallman *vs.* White (1848), 2 N. Y., 66.
Greene *vs.* Lunt (1870), 58 Me., 518.

In *Blackwell on Tax Titles*, 5th ed., it is said (sec. 224):

> " An accurate and a pertinent description of the " land embraced in the list is essential to its valid- " ity. The object of this requirement is, to enable " the owner to ascertain from the list itself that " the tax charged against him has been assessed " upon his land, and not upon that of a stranger. " Besides, the list is the foundation of all the sub- " sequent proceedings. Each document wherein " the land is designated must necessarily depend " upon the list for the accuracy of its description.

"A false or mistaken description in the list runs "through the warrant to collect, the advertise- "ment, return, certificate, and deed. And even "when an error is discovered and corrected in "either of the subsequent documents, a defective "listing is not cured by the amendment. It fol- "lows that unless a true description is contained "in the list, the officer has no guide in advertising, "selling, and conveying the land; the former "owner cannot know that his land is in jeopardy, "and be able to save it by paying the tax; nor "can the purchaser at the tax sale find and locate "the land after his purchase."

In *Black on Tax Titles*, sec. 112, it is said:

"The rule announced in the preceding sections "—that real estate must be assessed, for purposes "of taxation, in the name of the true owner, if he "can be discovered—is not the only safeguard "which the law provides for the protection of the "property-owner. In addition to this it is required "that the assessment-roll shall contain a sufficient "description of each parcel taxed. The object of "this provision, indeed, is threefold. First, it is "designed to inform the owner of the claim "upon his property; secondly, that if the taxes "are not paid, intending purchasers may know "what property will be offered for sale; and third- "ly, that a proper deed may be made to the ven- "dee. That a tax sale of property that is mis- "described, or not described, in the assessment-roll "will be wholly invalid, and will pass no title to "the purchaser, is conclusively established upon "the authorities."

In *Tallman* vs. *White* (1848), 2 N. Y., 66, RUGGLES, *J.*, says (p. 70).

"An accurate designation or description of the "land assessed, is essential to the validity of the

"assessment. The assessment of non-resident "lands is made with the ultimate view of collect- "ing the tax by advertisement and sale of the "land, if it should not be voluntarily paid. The "Comptroller's sale is a rigorous proceeding. It "divests the owner of his title without his consent, "and often for a very trivial consideration; and the "Legislature has therefore shown a cautious solic- "itude that it should not be done without his "knowledge. * * * The assessment must "therefore contain a true designation or descrip- "tion of the land to be sold, for two reasons: "first, in order that the purchaser at the sale "may be able to find and locate the land after his "purchase; and secondly, in order that the owner "may know that his land is advertised for sale or "redemption, and be able to save it by paying the "tax."

(3) A description which would be sufficient in a voluntary deed as between grantor and grantee may be wholly insufficient in tax proceedings. The reason is that a voluntary deed is the expression of the intent of the parties to it, and any words from which that intent can be ascertained may be sufficient. But the landowner whose title is to be divested by hostile tax proceedings is not a consenting party; he intends nothing.

Blackwell on Tax Titles, 5th ed., sec. 226.
Devlin on Deeds, sec. 1405.
Stout *vs.* Mastin (1891), 139 U. S., 151.
Tallman *vs.* White (1848), 2 N. Y., 66, 72.

In *Stout* vs. *Mastin* (1891), 139 U. S., 151, BREWER, *J.*, says (p. 152):

"Surrounding circumstances may sometimes "sustain an imperfect description in a voluntary "deed by a grantor, but seldom one made in host- "ile tax proceedings."

(4) Tax proceedings must be certain in themselves, and cannot be aided by extrinsic proof.

Black on Tax Titles, 2d ed., secs. 406, 407.
Blackwell on Tax Titles, 5th ed., sec. 227.
Stout *vs.* Mastin (1891), 139 U. S., 151.
Tallman *vs.* White (1848), 2 N. Y., 66, 72.
Curtis *vs.* Supervisors (1867), 22 Wis., 167.
Orton *vs.* Noonan, (1868), 23 Wis., 102.
People *vs.* Mahoney (1880), 55 Cal., 286.
Bowers *vs.* Andrews (1876), 52 Miss., 596.

In *Black on Tax Titles*, the rule in this regard is thus expressed (2d ed., sec. 406):

> " Where the description of land in a tax deed is " not sufficient and complete in itself, it becomes " important to know how far the courts will lend " it their aid, by the way of intendments and pre- " sumptions, and under what circumstances extra- " neous evidence will be admissible to clear up " ambiguities and identify the land. And in the " first place, keeping in mind the official nature of " the whole transaction and the necessity of perfect " accuracy and strict adherence to form, there is " no difficulty in reaching the conclusion that, in a " tax deed, words necessary to identify the land " will not be supplied by intendment, nor will any " part of the description be rejected as surplusage."

In *People* vs. *Mahony* [1880] 55 Cal., 286, the words of the description were, "bounded North by the lands of Regan and others."

Ross, *J.*, said (p. 289):

> " A more uncertain and indefinite boundary than " this can scarcely be conceived. Who the 'others' " are whose lands are said to bound the tract at- " tempted to be assessed does not appear upon the " face of the assessment, and extrinsic evidence,

" as we have seen, cannot be resorted to for the " purpose of showing."

In *Bowers* vs. *Andrews* [1876] 52 Miss., 596, the words of the deed were, " Lot and residence in Madi- " son Station, for the taxes assessed to the reputed " owner thereof, Thomas McMahon, for the year 1871." SIMRALL, *C. J.*, said (p. 602):

" The deed of a tax collector who sells *in invi-* " *tum*, by virtue of power conferred by law, must " in itself be sufficient to convey the thing sold. " The deed cannot be re-formed so as to help out a " defective description. There is no '*aggregatio* " *mentium*' which the instrument has mistaken."

(5) When in tax proceedings the officials attempt to exclude from their operation a specific part of the tract otherwise proceeded against, the part excepted must be described with certainty or the proceedings will be void.

Black, Tax Titles (2d ed.), sec. 405.
Marsh *vs.* Ne-ha-sa-ne Park Association (1896), 18 Misc., 314; Reversed 25 App. Div., 34.
Johnson *vs.* Ashland Lumber Co. (1881), 52 Wis., 458.

Black says (sec. 405):

" It is also well settled that a description of the " property as 'part' of a certain lot or tract, or as " so many acres of a certain tract, or as a certain " tract 'less' or 'excepting' a given number of " acres, is so uncertain and so lacking in precision " that it will avoid the deed.

It now remains to apply these principles to the present case.

We contend that the description contained in the rolls of 1868, 1869 and 1870 was fatally defective because neither of the excepted parcels—the 1,000 acres

in the N. W. corner and 1,215 acres water—is so described that it can be located.

The first exception is simply "1000 a. lying in the N. W. corner." It is not possible to say from these words alone what part of the quarter was assessed and what excepted.

What is the shape of this excepted parcel? Is it a square, a parallelogram or a triangle? It is evident enough that the number of different locations each of which will answer the description is infinite.

In *Marsh* vs. *Ne-ha-sa-ne Park Association* (1896), 18 Misc., 314, precisely the same question was presented. The validity of a tax deed was in controversy. The description in the deed was: "Eleven thousand and ten acres of land, being 'what remains of 20,000 being in "Long Lake after deducting * * *.' The North "East corner of the North East Quarter of the town- "ship two hundred and fifty acres."

KELLOGG, *J.*, says (p. 325):

> "I apprehend that no surveyor or civil engineer "could, with any degree of certainty, fix the bound- "aries of this parcel from this description. "Whether the form of the piece should be a tri- "angle, a square or a parallelogram it is impossi- "ble to say. The defendant says it is a parallelo- "gram—320 rods long and 125 rods wide—and so "says his expert Engineer Wood, but neither can "give any satisfactory reason. The engineer says "he could as well have locatedit in any other form. "* * * It is too plain to require argument, that "it is necessary to define with reasonable cer- "tainty the exception in order to define and locate "with reasonable certainty the land intended to "be conveyed."

It is true that this case has been reversed and a divided Appellate Division of the Supreme Court holds that a parcel of land excepted in a tax deed out of the

corner of the parcel described, is presumed to be laid out in a square form. The presumption sanctioned by this decision seems to be in conflict with the settled rule, that tax proceedings must be sufficient in themselves, and that words necessary to identify the land will not be added by intendment.

The words of O'BRIEN, *J.*, in *Zink* vs. *McManus* (1890), 121 N. Y., 259, 265, seem applicable to such a description:

> "There are but two boundary lines contained in "the description of the lands in the Comptroller's "deed. No land is actually inclosed by it. It is "impossible, from the description, to ascertain "the form or shape of the lot, or how far, either to "the west or to the south its actual boundaries "extend."

Such a description has been sustained in some States, where, by statute, land sold for taxes must be laid out in a square form.

> Newby *vs.* Brownlee (1885), 23 Fed. Rep. 320-323.

There is no such statute in New York.

The second exception in the assessment-roll is even more indefinite than the first. "Ex. 1215a, which is water." The evidence offered by plaintiff shows that the Northwest quarter of Township Twenty-four contains a part of Lower Saranac Lake; a part of Round or Middle Saranac Lake and a part of Little Weller Pond. It also appears from this evidence that the surface area of those bodies of water, so far as they are within the lines of the Northwest quarter, are as follows:

Lower Saranac Lake (including all islands)	948	acres.
Round or Middle Lake	115	"
Little Weller Pond	20	"
	1,083	"

From this should be deducted the area of the islands in the LowerLake and Round Lake.....	48 acres.
Area of water.....	1,035 "

(Record, p. 22.)

It may be assumed that the land covered by the water of the lakes and ponds was excepted, but this is not enough; there remains 180 acres which were excepted and not taxed. Until they are located it is not possible to locate the parcel of land assessed.

The description is at best that of a definite tract of land, excepting an undefined and unlocated part. The addition of the word water to the 1,215 acres excepted wholly fails to identify the parcel, because there are not that number of acres to which the descriptive words applies, and that failing, the identification of the 5,285 acres fails also.

The defendant attempted to meet these facts by offering evidence tending to show that between 1860 and 1870 there was a dam across the outlet of the Lower Saranac Lake built by lumbermen for the purpose of holding back the water of the lake in the spring to aid them in driving logs; that when this dam was closed the level of the lake was raised from two to five feet, but that as the driving season advanced and the water was drawn off to run logs down the river the lake fell to about its normal level (Record, p. 23.) The effect of raising the level of the lake was, of course, to flood the swamps and low lands in its vicinity, the area of lands so flooded being from two hundred to two hundred and fifty acres (Record, p. 23).

This proof, instead of making certain the description of the 1,215 acres which were excepted, seems to us to make it still more uncertain. The Court is asked to include in the exception not only the 1,035 acres ordi-

narily covered with water, but also 250 acres of swamps and sloughs, covered with water at certain times and under certain conditions. If the Court accede to this and assume that the swamps and swales were covered with water when the assessments were made, then the defendant has proved too much, for on that theory there are 1,285 acres of land under water and the exception only relates to 1,215, and we are no nearer a certain location of the excepted parcel than we were before. Where is the 70-acre parcel covered with water which was taxed, and where is the 1,215-acre parcel which was not taxed? It is plainly impossible to say. Further than this, if it be assumed that the assessment-rolls were made out in the spring or early summer, when the water was high, then as the swamps and low ground around Little Weller Pond and along the river were largely covered with water at that season, they also must be added to the area of water in question (Record, p. 23).

The evidence offered by the defense on this point only adds a new element of uncertainty to the situation. It makes it appear that there are three sorts of land in the tract in question, viz. : land which is land ; land which is water ; and land which is sometimes one and sometimes the other ; and the Court is asked to guess whether by the term "water" the assessors of thirty years ago meant not only what that word would naturally mean, but also the swamps and swales which might or might not be water, depending on the condition of the dam.

We submit that under the circumstances shown by the proofs the word "water" is not sufficient to identify the excepted parcel of 1,215 acres, and the case stands just as if it had been omitted.

As instances of tax sales which have been held void by reason of uncertain description we refer to the following cases :

Ronkendorff vs. *Taylor* (1830), 4 Pet., 349:

"One-half of Lot No. 4 in Square No. 491."

Bank of Utica vs. *Mersereau* (1848), 3 Barb. Ch., 528, 583:

Eight hundred acres of land to be laid out in a square form as nearly as may be the northwest corner of 2,400 acres in Township No. 1 assessed to Garretson and described in the assessment as bounded on the south by Jonathan Mersereau and others; west by the town line; north by Rathbone and the town line and east by the Tioga river and Ryers and others (p. 547).

The description of the 2,400 acres was held so uncertain that the 800 acres could not be located.

Zink vs. *McManus* (1890), 121 N. Y., 259, 265:

"Part of Bird farm, 872 feet front, 290 feet north line "deep on the easterly side of Military road, commencing 918.60 feet northerly from Hertel avenue."

People vs. *Cone* (1874), 48 Cal., 427:

Tract described by metes and bounds "excepting "therefrom that portion of about 8,000 acres, sold by "Job Dye to F. W. Fratt and T. R. King."

CROCKETT, *J.* (p. 429):

> "It is impossible to ascertain from the assessment, on its face, what particular lands were intended to be assessed and what excepted. In order to determine with any reasonable certainty the particular tract assessed, it would be necessary to make a laborious search of the records, and possibly to invoke the aid of a surveyor."

Hill vs. *Mowry* (1856), 6 Gray, 551:

"Beginning at the southeast corner of the Episcopal "Church lot and running thence northerly to land of "said Mowry, thence running easterly on said Mowry's "land to land of said Hill, thence running southerly "to a street laid out by said Hill, thence to the first "bound."

SHAW, *C. J.* (p. 552):

"The Court are of opinion that the deed of the "collector, taking effect only as the execution of a "statute power, should be construed with some "strictness, so as to enable the grantee to identify "the land, and to enable the owner to redeem it. "On examination of the plan, we think this deed "fails in these particulars, and is void for uncer- "tainty."

Tripp vs. *Ide* (1854), 3 R. I., 51, 58:

"A certain lot of land and buildings in said North "Providence, and being taxed in the name of Hiram Ide, "viz., being about ten acres of land on the easterly side "of the road that leads from Olneyville to Triptown; "for a further description reference is had to a certain "mortgage deed given to William Angell, which mort- "gage is recorded in North Providence Registry of "Deeds, book 8, page 228."

The reference to the mortgage recorded was wrong.

STAPLES, *C. J.*:

"It is impossible by this description alone to "determine that the collector intended to con- "vey the premises described in the plaintiff's "declaration, or what he did convey."

It follows that the Court erred in refusing to affirm the fifth proposition of law submitted by plaintiff (Record, p. 24) and that the fourth assignment of error was well taken (Record, p. 33).

It also follows that the Court erred in receiving in evidence the Comptroller's deed based on the 1881 sale, which deed described the land conveyed in the same words as those used in the assessment-rolls of 1868–1870 (Record, pp. 17, 18), and that the eighth assignment of error was well taken (Record, p. 34).

III.

The act of the Comptroller at the sales of 1881, 1885, and 1890 in treating the land as already the property of the State, and in rejecting all bids, was a jurisdictional defect in the proceedings, unless the property was already the property of the State under the 1877 sale.

An amendment of 1881 to chapter 427 of Laws of 1855 required the Comptroller to bid in for the State all lands "then belonging to the State" and to reject any and all other bids therefor (chap. 402 of 1881, sec. 5, Appendix, p. 79).

The plaintiff gave evidence tending to show that at the 1881 sale the lands in question were claimed by the Comptroller as the property of the State; that on the Sales Book (or list of lands to be sold) prepared by him in anticipation of the sale the word "State" was written against all lots supposed to be State property; that when a parcel against which such memorandum had been made was reached for sale, the officer conducting the sale would immediately bid in the parcel for the State, and the auctioneer would at once, and without giving any opportunity for bids, strike the same off to the State; that any bid made for lands marked "State" on the Sales Book were rejected, and that the land now in question was so marked (Record, p. 22).

The Court was asked to rule that

"If the Court shall find that at the sale of 1881 the "Comptroller treated the land in question as already "the property of the State and struck the same off the "State without giving any opportunity for other per- "sons to bid thereon, then the State acquired no title "by reason of such sale, and such sale was not vali-

" dated or made effectual by chapter 448 of Laws of " 1885 or chapter 711 of 1893 (Record, p. 25).

The request was refused, and on such refusal error is assigned. The Amendment of 1881 has been twice before the Courts of New York, and it has so far been held that it does not attempt to give to the peremptory bidding in which it requires the force of an independent purchase; that as regards lands not in fact and in law " belonging to the State," it has no application, and that if the Comptroller does so sell lands not the property of the State, such procedure is a jurisdictional defect and the State gets no title by such bidding in.

Turner *vs.* Boyce (1895), 11 Misc., 502, 513.

Andrus *vs.* Wheeler (1896), 18 Misc., 646, 651; reversed 22 App. Div., 596.

In *Andrus* vs. *Wheeler* the trial Court had found that both the sales of 1881 and 1885 were invalid by reason of the act of the Comptroller in treating the land then in question as already State property. The Appellate Division concurred in the holding that when the land was not in fact State property, such procedure was a jurisdictional defect, but it reversed because such fact was not proved as regards the 1885 sale, but inadvertently assumed by the trial Court.

The question seems to be primarily one of statutory construction. Did the Legislature intend, by the amendment of 1881, that the State should acquire title to land which it did not already own by this formal sale at which no one should be allowed to bid, or did it intend merely that lands already owned by the State should be withdrawn from the sale?

The construction given to the act by Kellogg, *J.*, at Special Term, in the case of *Turner* vs. *Boyce* (1895), 11 Misc,. 502, has been accepted as correct, so far the question has been before the Court of New York, and it

would seem to be a construction founded in common sense. He says (p. 512):

"I do not think that the Legislature ever supposed that any one would be misled into the belief that a deed made in accordance with its injunction in this section created a title in the State or mended any. It is only as to lands *already belonging to the State* that the Comptroller is authorized to refuse bids. To such lands the State needs no new or additional grant. If the State did not already own them, the State, to get title, must compete with other bidders. So, the intention of the Legislature is apparent. It was merely intended to withdraw such lands from the sale. Deeding to the State under such circumstances, while an authorized form made such deeds only evidence that the State paid the tax because of previous ownership.

"Obviously, to give to such deeds the character and force of independent grants would be to hold that the State is not prohibited by the Constitution from taking the property of the citizen without compensation or without due process of law. The owner of the land is deprived of his right to have his land go to the person who will take the smallest quantity and pay the tax, saving to himself the portion not required to pay the tax. As to the lands already owned by the State the provisions of this section harm no one, but as to lands not in fact owned by the State the State has no power to obtain title in this way, nor does this section presume to confer such power."

SIXTH.

The Court erred in receiving evidence against plaintiff's objection.

Two exceptions are presented to the rulings of the Court upon questions of evidence and error assigned upon them. These are :

First—The reception of the Comptroller's deed based on the 1881 sale, against plaintiff's objection that it was void on its face for uncertainty of description (Record, pp. 17, 18).

Second—The reception of the Comptroller's certificate of sale from the 1890 sale, against the objection of plaintiff that it was not evidence of a conveyance of title, or, at most, evidence of an equitable title, which could not be considered in an action of ejectment (Record, p. 19).

(1) *The Comptroller's deed on the* 1881 *sale was void by reason of uncertain description.*

That description was :

> " Macomb's Purchase, Great Tract One (1) Town-
> " ship twenty-four (24), northwest quarter (¼), five
> " thousand two hundred and eighty-five acres
> " being all that remains of said northwest quarter
> " after excepting therefrom one thousand (1,000)
> " acres in the northwest corner thereof and twelve
> " hundred and fifteen (1,215) acres thereof covered
> " by water.
>
> " One thousand (1,000) acres in the northwest
> " corner of said northwest quarter."

This description is the same as that contained in the assessment-rolls for 1868, 1869 and 1870, and its sufficiency has been already considered.

The rule requiring certainty of description in tax proceedings applies *a fortiori* to the deed which con-

summates them. It must be sufficient *in itself* to identify the precise parcel intended to be conveyed.

Stout *vs.* Mastin (1891), 139 U. S., 151.
Tallman *vs.* White (1848), 2 N. Y., 66, 70.
Matter of N. Y., C. and H. R. R. R. (1877), 70 N. Y., 191.
Matter of N. Y., C. and H. R. R. R. (1882), 90 N. Y., 342.
Zink *vs.* McManus (1890), 121 N. Y., 259.
People *vs.* Mahoney (1880), 55 Cal., 286.
Curtis *vs.* Supervisors (1867), 22 Wis., 167.
Orton *vs.* Noonan (1868), 23 Wis., 102.
Bowers *vs.* Andrews (1876), 52 Miss., 596.

How is it possible, from the description contained in the deed alone, to locate the 5,285-acre parcel which it purports to convey? The exception must, of course, be first located. The parcel of 1,000 acres in the northwest corner may be located in an infinite number of ways. Is it a square, a parallelogram or a triangle? Of course, if the rule is to be adopted that a parcel of land in the corner of a larger tract means that such parcel is to be laid out in a square form, the exception may be certain enough. But such presumption violates the rule that in a tax deed words necessary to identify the land will not be supplied by intendment.

The exception of 1,215 acres water is still more uncertain. There is nothing to locate the excepted parcel as to shape or boundaries except the word "water." It does not appear on the face of the deed what part of the township is land covered by water, nor indeed with any certainty that any part of it is so covered. The exception is not of *all lands* covered by water, but of a specific number of acres. The expression "covered by water" would seem to identify the excepted parcel only in the contingency (which in this case did not happen) that the area of land so covered happened to exactly correspond with the area excepted. The

exception is not different in principle from what it would have been had it read "1,215 acres covered with forest," in which case its insufficiency would have been evident.

(2) *The certificate issued on the* 1890 *sale was incompetent.*

The New York statute is that the legal title to land sold for taxes shall be conveyed by a deed to be executed by the Comptroller under his hand and seal, and witnessed by the Deputy Comptroller, Surveyor-General or Treasurer (chap. 427 of 1855, secs. 63, 65; Appendix, p. 53).

The certificate given on the sale by the Comptroller to the purchaser is not a conveyance in any sense, but merely a memorandum of the purchase and a statement of the time when the purchaser will be entitled to a deed (chap. 427 of 1855, sec. 46; Appendix, p. 48).

It was this certificate which defendant offered as evidence (Record, p. 19).

It is, we think, settled law that the certificate of sale does not of itself convey title. It does, of course, give the purchaser an interest in the land. Prior to the expiration of the time to redeem, such interest is a lien merely. After that it may, perhaps, be treated as evidence of an equitable title.

Blackwell, Tax Titles, 5th ed., sec. 963.

In *Lessee of Rice* vs. *White* (1837), 8 Ohio, 216, an action of ejectment on a tax title, the Court says:

> "The certificate of purchase does not convey a "legal title; but it is evidence of an equitable "title to the land, and enables the purchaser to "call in the legal title."

Dolph vs. *Barney* (1874), 5 Oregon, 191, 213, is to the same effect.

It is also settled law that an equitable title is no

defense to an action of ejectment in this Court. In such action the strict legal title prevails.

Foster *vs.* Mora (1878), 98 U. S., 425.
Johnson *vs.* Christian (1888), 128 U. S., 374.

The Practice Act of 1872, requiring practice to conform to State rules, does not authorize equitable defenses in ejectment, though permissible by State practice.

Sedgwick and Wait, Trial of Title (2d ed.), sec. 881.
Butler *vs.* Young (1872), 1 Flipp., 276.

SEVENTH.

The judgment should be reversed and a new trial ordered.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Plaintiff in Error.

Plattsburgh, N. Y.

April, 1899.

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Supreme Court of the United States.

THE SARANAC LAND AND TIMBER COMPANY,
Plaintiff in Error,

against

JAMES A. ROBERTS, as Comptroller,
Defendant in Error.

October Term, 1897
No. ~~331.~~ 944.

Appendix to Brief for Plaintiff in Error.

Counsel have endeavored in this appendix to collect the Statutes of New York to which reference is made in the brief, and also those relating to taxation to which reference is made in the opinions of the principal New York authorities cited.

We have intended to submit these statutes as they were at the time the tax proceedings were had which have given rise to this controversy; that is, between 1866 and 1885. We have added some short statutes of a later date amending the act (chap. 448 of 1885) the validity of which is challenged.

We have omitted certain titles of the Revised Statutes relating to taxation of corporations and to certain counties only.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Plaintiff in Error.

Revised Statutes.

[Original paging.]

(Took effect January 1, 1838.)

PART I., CHAPTER XIII.

[387] OF THE ASSESSMENT AND COLLECTION OF TAXES.

Title I.

OF PROPERTY LIABLE TO TAXATION.

What Subject to Taxation.

SECTION 1. All lands and all personal estate within this State, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified.

Lands Defined.

§ 2. The term "land," as used in this chapter, shall be construed to include the land itself, all buildings, and other articles erected upon or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries and fossils, in and under the same, except mines belonging to the state; and the terms "real estate" and "real property," whenever they occur in this Chapter, shall be construed as having the same meaning as the term "land" thus defined.

Personal Estate Defined.

[388] § 3. The terms "personal estate," and "personal property," whenever they occur in this Chapter, shall be construed to include all household furniture; monies; goods; chattels; debts due from solvent debtors, whether on account, contract, note, bond or mortgage; public stocks; and stocks in monied corporations. They shall also be construed to include such

portion of the capital of incorporated companies, liable to taxation on their capital as shall not be invested in real estate.

Property Exempt from Taxation.

§4. The following property shall be exempt from taxation:

1. All property, real or personal, exempted from taxation by the Constitution of this state, or under the Constitution of the United States:

2. All lands belonging to this state, or the United States:

3. Every building erected for the use of a college, incorporated academy, or other seminary of learning; every building for public worship; every school-house, court-house and jail; and the several lots whereon such buildings are situated, and the furniture belonging to each of them:

4. Every poor-house, alms-house, house of industry, and every house belonging to a company incorporated for the reformation of offenders, and the real and personal property belonging to, or connected with the same:

5. The real and personal property of every public library:

6. All stocks owned by the state, or by literary or charitable institutions:

7. The personal estate of every incorporated company not made liable to taxation on its capital, in the fourth title of this chapter:

8. The personal property of every minister of the gospel, or priest, of any denomination; and the real estate of such minister, or priest, when occupied by him, provided such real and personal estate do not exceed the value of one thousand five hundred dollars: and,

9. All property exempted by law from execution.

Deductions in Case of Minister, etc.

§ 5. If the real and personal estate, or either of them, of any minister or priest, exceed the value of one thousand five hundred dollars, that sum shall be deducted from the valuation of his property, and the residue shall be liable to taxation.

Lands Sold by the State.

§ 6. Lands sold by the state, though not granted, or conveyed, shall be assessed in the same manner as if actually conveyed.

Individual Owners of Stocks.

§ 7. The owner or holder of stock in any incorporated company liable to taxation on its capital, shall not be taxed as an individual, for such stock.

Title II.

[389] Of the Place and Manner in which Property is to be Assessed.

ARTICLE FIRST.

Of the Place in which Property is to be Assessed.

Lands, Where Taxed.

Section 1. Every person shall be assessed in the town or ward where he resides when the assessment is made, for all lands then owned by him within such town or ward, and occupied by him, or wholly unoccupied.

Lands not Occupied by Owner.

§ 2. Land occupied by a person other than the owner, or may be assessed to the owner or occupant, or as non-resident lands.

[As amended by L. 1851, ch. 176.]

Non-resident Lands Defined.

§ 3. Unoccupied lands, not owned by a person residing in the ward or town where the same are situated, shall be denominated "lands of non-residents," and shall be assessed as hereinafter provided.

Lands Divided by Boundary Lines.

§ 4. When the line between two towns or wards divides a farm, or lot, the same shall be taxed, if occupied, in the town or ward where the occupant resides; if unoccupied, each part shall be assessed in the town in which the same shall lie; and this, whether such division line be a town line only, or be also a county line.

Personal Estate, where Taxed.

§ 5. Every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator, and in no case shall property so held under either of these trusts, be assessed against any other person, and in case any person possessed of such personal estate shall reside during any year in which taxes may be levied, in two or more counties, towns or wards, his residence for the purposes and within the meaning of this section, shall be deemed and held to be in the county, town or ward in which his principal business shall have been transacted, but the products of any state of the United States, consigned to agents in any town or ward of this state, for sale on commission, for the benefit of the owner thereof, shall not be assessed to such agent, nor shall such agents of monied corporations or capitalists be liable to taxation under this section, for any monies in their possession or under their control transmitted to them for the purposes of investment or otherwise.

[As amended by L. 1851, ch. 176.]

Property of Corporations, where Taxed.

§ 6. The real estate of all incorporated companies liable to taxation, shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital, shall be assessed in the town or ward where the principal office, or place for transacting the financial
[390] concerns of the company, shall be; or if such company have no principal office, or place for transacting its financial concerns, then in the town or ward where the operations of such company shall be carried on. In the case of toll-bridges, the company owning such bridge shall be assessed in the town or ward in which the tolls are collected; and where the tolls of any bridge, turnpike, or canal company, are collected in several town or wards, the company shall be assessed in the town or ward, in which the treasurer or other officer authorized to pay the last preceding dividend, resides.

ARTICLE SECOND.

OF THE MANNER IN WHICH ASSESSMENTS ARE TO BE MADE, AND THE DUTIES OF THE ASSESSORS.

Assessment Districts.

§ 7. The assessors chosen in each town or ward, may divide the same by mutual agreement, into convenient assessment districts, not exceeding the number of assessors in such town or ward.

Inquiry as to Names of Taxable Inhabitants.

§ 8. Between the first days of May and July, in each year, they shall proceed to ascertain, by diligent inquiry, the names of all the taxable inhabitants, in their respective towns or wards, and also all the taxable property, real or personal, within the same.

Assessment-Roll, Form of.

§ 9. They shall prepare an assessment-roll, in which they shall set down in four separate columns, and according to the best information in their power:

1. In the first column, the names of all the taxable inhabitants, in the town or ward, as the case may be.

2. In the second column, the quantity of land to be taxed to each person.

3. In the third column, the full value of such land, [391] according to the definition of the term land, as given in the first title of this chapter.

4. In the fourth column, the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him.

Trustee, Guardian, etc., how Assessed.

§ 10. Where a person is assessed as trustee, guardian, executor or administrator, he shall be assessed as such, with the addition to his name of his representative character, and such assessment shall be carried out in a separate line from his individual assessment; and he shall be assessed for the value of the real estate held by him, in such representative character, at the full value thereof, and for the personal property held by him in such representative character, deducting from such personal property the just debts due from him in such representative character.

Lands of Non-residents.

§ 11. The lands of non-residents shall be designated in the same assessment-roll, but in a part thereof separate from the other assessments, and in the manner prescribed in the two following sections.

Proceedings of Assessors where Tract is Subdivided.

§ 12. If the land to be assessed, be a tract which is subdivided into lots, or be part of a tract which is so subdivided, the assessors shall proceed as follows:

1. They shall designate it by its name, if known by one, or if it be not distinguished by a name, or the name be unknown, they shall state by what other lands it is bounded;

2. If they can obtain correct information of the subdivisions they shall put down in their assessment-rolls, and in a first column, all the unoccupied lots in their town or ward, owned by non-residents, by their numbers alone and without the names of their owners, beginning at the lowest and proceeding in numerical order to the highest;

3. In a second column, and opposite to the number of each lot, they shall set down the quantity of land therein, liable to taxation;

4. In a third column, and opposite to the quantity, they shall set down the valuation of such quantity;

5. If such quantity be a full lot, it shall be designated by the number alone; if it be part of a lot, the part must be designated by boundaries, or in some other way, by which it may be known.

Same, where Tract is not Subdivided.

§ 13. If the land so to be assessed be a tract which is not subdivided, or if its subdivisions cannot be ascertained by the assessors, they shall proceed as follows:

1. They shall enter in their roll the name or boundaries thereof, as above directed, and certify in the roll that such tract is not subdivided, or that they can not obtain correct information of the subdivisions, as the case may be;

[392] 2. They shall set down in the proper column, the quantity and valuation as above directed;

3. If the quantity to be assessed be the whole tract,

such a description by its name or boundaries will be sufficient; but if a part only is liable to taxation, that part or the part not liable, must be particularly described;

4. If any part of such tract be settled and occupied by a resident of the town or ward, the assessors shall except such part from their assessment of the whole tract, and shall assess it as other occupied lands are assessed; and if they can not otherwise designate such parts, they shall notify the supervisor of the town, who shall cause a survey and two manuscript maps to be made, for the purpose of ascertaining the situation and quantity of every such occupied part.

5. One of those maps shall be delivered by the supervisor to the county treasurer, to be by him transmitted to the comptroller, and the other shall be delivered in like manner to the assessors;

6. The assessors shall then complete the assessment of the tract, and shall deposit the map in the town clerk's office, for the information of future assessors. And the expense of making such survey and map shall be immediately repaid to the supervisor out of the county treasury; and it shall be added by the board of supervisors to the tax on the tract, distinguishing it from the ordinary tax.

Survey of Non-resident Lands Divided by Town Line.

§ 14. Whenever it shall be deemed necessary by the assessors of any town, to have an actual survey made, to ascertain the quantity of any lot or tract of non-resident lands which is divided by the town line, they shall notify the supervisor, who shall cause the necessary surveys to be made at the expense of the town.

[Sections 15 and 16 repealed by L. 1851, ch. 176.]

Rule of Valuation.

§ 17. All real and personal estate liable to taxation, [393] shall be estimated and assessed by the assessors at its

full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor.

[As amended by L. 1851, ch. 176.]

Qualification of Rule.

§ 18. The preceding section shall be followed in all assessments made under this chapter, except where the assessors shall be specially required by law to observe a different rule.

Roll, when to be completed; Notice.

§ 19. The assessors shall complete the assessment-rolls on or before the first day of August, in every year, and shall make out one fair copy thereof, to be left with one of their number. They shall forthwith cause notices thereof to be left with one of their number; they shall forthwith cause notices thereof to be put up at three or more public places in their town or ward; and in case the assessment-roll shall include property belonging to a railroad corporation, they shall at the same time cause a like notice to be mailed to the treasurer thereof, or delivered to the railroad agent at the nearest station.

[As amended by L. 1857, ch. 536 and L. 1858, ch. 110.]

Contents of Notices.

§ 20. Such notices shall set forth that the assessors have completed their assessment-roll, and that a copy thereof is left with one of their number at a place to be specified therein, where the same may be seen and examined by any person interested, until the third Tuesday of August; and that on that day the assessors will meet at a time and place also to be specified in such notice, to review their assessments. On the application of any person conceiving himself aggrieved, it shall be the duty of the said assessors on such day to meet

at the time and place specified, and hear and examine all complaints in relation to such assessments that may be brought before them; and they are hereby empowered, and it shall be their duty to adjourn from time to time, as may be necessary, to hear and determine in accordance with the rule prescribed by section fifteen of said title two, such complaints; but in the several cities of this state, the notices, required by this section, may conform to the requirements of the respective laws regulating the time, place and manner for revising the assessments in said cities, in all cases where a different time, place and manner is prescribed by said laws from that mentioned in this act.

[As amended by L. 1851, ch. 176 and L. 1857, ch. 596.]

Inspection of Roll.

§ 21. The assesssor with whom such assessment-roll is left, shall submit the same, during the twenty days specified in such notice, to the inspection of all persons who shall apply for that purpose.

[Sections 22, 23, 24, 25 and 26 repealed by L. 1851, ch. 176.]

Delivery of Rolls by Assessors.

§ 27. The roll, thus certified, shall, on or before the [394] first day of September in every year, be delivered by the assessors of each ward, in the city of New York, to the clerk of the city, and by the assessors of every other town or ward, to the supervisor thereof, who shall deliver the same to the board of supervisors at their next meeting.

Assessors to Act under Instructions from Comptroller.

§ 28. The assessors, in the execution of their duties, shall use the forms, and pursue the instructions, which shall from time to time be transmitted to them by the comptroller.

Neglect of Duty by Assessors.

§ 29. If any assessor shall willfully refuse or neglect to perform any of the duties required of him, by this chapter, he shall forfeit, to the people of this state, the sum of fifty dollars.

Names of Delinquent Assessors to be Certified.

§ 30. If any assessor shall neglect, or from any cause omit to perform his duties, the other assessors, or either of them, of the town or ward, shall perform such duties, and shall certify to the supervisors with their assessment-roll, the name of such delinquent assessor, stating therein the cause of such omission.

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ARTICLE THIRD.

Of the Equalization of the Assessments, and the Correction of the Assessment Rolls.

Supervisor to Examine Assessment Rolls.

§ 31. The board of supervisors of each county in this state, at their annual meeting, shall examine the assessment-rolls of the several towns in their county, for the purpose of ascertaining whether the valuationss in one town or ward, bear a just relation to the valuations in all the towns and wards, in the county; and they may increase or diminish the aggregate valuations of real estates, in any town or ward, by adding or deducting such sum upon the hundred as may, in their opinion, be necessary, to produce a just relation between all the valuations of real estates in the county; but they shall, in no instance, reduce the aggregate valuations of all the towns and wards, below the aggregate valuation thereof, as made by the assessors.

Lands of Non-residents.

§ 32. The board of supervisors shall also make such alterations in the descriptions of the lands of non-residents, as may be necessary to render such descriptions conformable to the provisions of this chapter; and if such alterations can not be made, they shall expunge the descriptions of such lands, and the assessments thereon, from the assessment-rolls.

Tax to be Set Down.

§ 33. They shall also estimate and set down in a fifth column, to be prepared for that purpose, in the assessment-rolls, opposite to the several sums set down as the valuations of real and personal estates, the respective sums in dollars and cents, rejecting the fractions of a cent, to be paid as a tax thereon.

Aggregate Valuation to be Determined.

§ 34. They shall also add up and set down the aggregate valuations of the real and personal estates in the several towns and wards, as corrected by them; and shall cause their clerk to transmit to the comptroller, by mail, a certificate of such aggregate valuations, showing separately, the aggregate amount of real and personal estate in each town or ward, as corrected by the board.

Corrected Assessment-Roll to be Delivered.

§ 35. They shall cause the corrected assessment-roll of each town or ward, or a copy thereof, to be delivered to each of the supervisors of the several towns or wards, who shall deliver the same to the clerk of their city or town, to be kept by him for the use of such city or town.

[396] *Copies to be Delivered to Collectors.*

§ 36. The boards of supervisors of the several counties in this state, shall cause the corrected assessment-roll of each town or ward in their respective counties, or a fair copy thereof, to be delivered to the collector of such town or ward, on or before the fifteenth day of December in each year.

Contents of Warrant to Collectors.

§ 37. To each assessment-roll, so delivered to a collector, a warrant, under the hands and seals of the board of supervisors, or of a majority of them, shall be annexed, commanding such collector, to collect from the several persons named in the assessment-roll, the several sums mentioned in the last column of such roll, opposite to their respective names.

If the warrant be directed to the collector of a town, it shall direct the collector, out of the monies so to be collected, after deducting the compensation to which he may be legally entitled, to pay,

1. To the commissioners of common schools of his town, such sum as shall have been raised for the support of common schools therein:

2. To the commissioners of highways of the town, such sum as shall have been raised for the support of highways and bridges therein:

3. To the overseers of the poor of the town, if there be no county poor-house, or other place provided in the county for the reception of the poor, such sum as shall have been raised for the support of the poor in such town:

4. To the supervisor of the town, all other monies which shall have been raised therein, to defray any other town expenses: and,

5. To the treasurer of the county, the residue of the monies so to be collected.

If the warrant be directed to the collector of a ward, it shall direct the collector to pay all the monies to be collected, after deducting his compensation, to the treasurer of the county.

In all cases, the warrant shall authorize the collector, in case any person named in the assessment-roll shall refuse or neglect to pay his tax, to levy the same by distress and sale of the goods and chattels of such persons; and it shall require all payments therein specified, to be made by such collector, on or before the first day of February then next ensuing.

Supervisors to Transmit Accounts to County Treasurer.

§ 38. As soon as the board of supervisors shall have sent or delivered the rolls, with such warrants annexed, to the collectors, they shall transmit to the treasurer of the county an account thereof, stating the sums of the several collectors, the amount of money they are respectively to collect, the purposes for which the same are to be collected, and the persons to whom, and the time when the same are to be paid; and the county treasurers, on receiving such account, shall charge to each collector, the sums to be collected by him.

Variation of Warrant in Cities.

§ 39. Wherever the laws respecting cities, shall have directed the monies assessed for any local purpose, to be paid to any person or officer other than those named in the preceeding thirty-seventh section, the collector's warrant may be varied accordingly, so as to [397] conform to such alteration.

Title III.

OF THE COLLECTION OF TAXES, THE DISPOSITION TO BE MADE OF THE MONIES COLLECTED, AND THE PROCEEDINGS IN RELATION TO UNPAID TAXES.

ARTICLE FIRST.

OF THE MANNER IN WHICH TAXES ARE TO BE COLLECTED, AND THE DUTIES OF THE COLLECTOR.

Collector to Call for Taxes.

SECTION 1. Every collector, upon receiving the tax-list and warrant, shall proceed to collect the taxes therein mentioned, and for that purpose shall call, at least, once, on the person taxed, or at the place of his usual residence, if in the town or ward for which such collector has been chosen, and shall demand payment of the taxes charged to him on his property.

Levy of Tax by Distress and Sale.

§ 2. In case any person shall refuse or neglect to pay the tax imposed on him, the collector shall levy the same by distress and sale of the goods and chattels of the person who ought to pay the same, or of any goods and chattels in his possession, wheresoever the same may be found, within the district of the collector; and no claim of property to be made thereto by any other person, shall be [398] available to prevent a sale.

Notice of Sale of Goods Distrained.

§ 3. The collector shall give public notice of the time and place of sale, and of the property to be sold, at least six days previous to the sale, by advertisements to be posted up in, at least, three public places, in the town where such sale shall be made. The sale shall be by public auction.

Surplus Monies Arising on Sale.

§ 4. If the property distrained shall be sold for more than the amount of the tax, the surplus shall be returned to the person in whose possession such property was, when the distress was made, if no claim be made to such surplus by any other person. If any other person shall claim such surplus, on the ground that the property sold belonged to him, and such claim be admitted by the person for whose tax the same was distrained, the surplus shall be paid to such owner; but if such claim be contested by the person for whose tax the property was distrained, the surplus monies shall be paid over by the collector to the supervisor of the town, who shall retain the same until the rights of the parties shall be determined by due course of law.

Proceedings in Case of Removal of Person Taxed.

§ 5. In case any person upon whom any tax now is, or hereafter shall be assessed, in any ward of any of the cities, or in any town within this state, shall have removed out of such ward or town, after such assessment, and before such tax ought by law to have been collected; or if any person shall neglect or refuse to pay any tax which now is, or hereafter shall be assessed in any ward of either of the said cities, or in any town, upon any estate of such person, situated out of the ward or town in which he shall reside, and within the county; it shall be lawful, in either of those cases, for the collector of such ward or town, to levy and collect such tax of the goods and chattels of the person assessed, in any ward within the said county, to which such person shall have so removed, or in which he shall reside.

Collector to Pay Over Monies.

§ 6. Every collector shall, within one week after the time mentioned in his warrant, for paying the monies

directed to be paid to the town officers of his town and to the county treasurer, pay to such town officers and county treasurer, the sums required in such warrant to be paid to them respectively, first retaining the compensation to which he may be legally entitled. The town officers to whom any such monies shall be paid, shall deliver to the collector duplicate receipts therefor, one of which duplicates shall be filed by the col-
[399] lector with the county treasurer, and shall entitle him to a credit, in the books of the county treasurer, for the amount therein stated to have been received; and no other evidence of such payment shall be received by the county treasurer.

Surplus, how Disposed Of.

§ 7. Whenever any greater amount of taxes shall be assessed in any town than the town charges thereof, and its proportion of the state tax, and county charges, the surplus shall be paid by the collector to the county treasurer, who shall place it to the credit of such town, and the same shall go to the reduction of the tax of the succeeding year.

Tax on Part of Lot.

§ 8. The collector shall receive the tax on a part of any lot, piece or parcel of land, charged with taxes, provided the person paying such tax shall furnish a particular specification of such part; and if the tax on the remainder of such lot, piece or parcel of land, shall remain unpaid, the collector shall enter such specification, in his return to the county treasurer, to the end that the part on which the tax remains unpaid, may be clearly known.

Tax on Undivided Share.

§ 9. If the part on which the tax shall be so paid, be an undivided share, then the person paying the same,

shall state to the collector who is the owner of such share, that it may be accepted in case of a sale for the tax on the remainder. And the collector shall enter the name of such owner on his account of arrears of taxes.

Collector to Make Return of Unpaid Taxes.

§ 10. If any of the taxes mentioned in the tax-list annexed to his warrant shall remain unpaid, and the collector shall not be able to collect the same, he shall deliver to the county treasurer an account of the taxes so remaining due; and upon making oath before the county treasurer, or in case of his absence, before any justice of the peace, that the sums mentioned in such account remain unpaid, and that he has not, upon diligent inquiry, been able to discover any goods or chattels, belonging to, or in the possession of the persons charged with, or liable to pay such sums, wherein he could levy the same, he shall be credited by the county treasurer with the amount thereof.

Refusal of Collector to Serve.

§ 11. If any person chosen or appointed to the office of collector of any town or ward in this state, shall refuse to serve, or shall die, resign, or remove out of the town or ward, before he shall have entered upon or completed the duties of his office, or shall be disabled from completing the same, by reason of sickness or any other cause, the supervisor and any two justices of such town or ward, shall forthwith appoint a collector for the remainder of the year, who shall give the like security, and be subject to the like duties and penalties, and have the same powers and compensation, as the collector in whose place he was appointed; and the supervisor shall forthwith give notice of such appointment to the county treasurer. But such appointment

shall not exonerate the former collector, or his sureties, from any liability incurred by him or them.

Warrant to Person Appointed.

[400] § 12. If a warrant shall have been issued by the board of supervisors prior to any appointment under the last section, the original warrant, if the same can be obtained, shall be delivered to the collector so appointed, and shall be considered as giving him the same powers as if originally issued to himself; but if such warrant can not be obtained, a new one shall be made out by the clerk of the board of supervisors of the county, which shall be directed to the collector so appointed. And upon every such appointment, the supervisor of the town or ward, if he shall think it necessary may extend the time limited for the collection of the taxes, for a period not exceeding thirty days; of which extension he shall forthwith give notice to the county treasurer.

Proceedings in Case Collector Neglects to Pay over Monies.

§ 13. If any collector shall refuse or neglect to pay to the several town officers of his town or to the county treasurer, the sums required by his warrant to be paid to them respectively, or either of them, or to account for the same as unpaid, the county treasurer shall, within twenty days after the time when such payments ought to have been made, issue a warrant under his hand and seal, directed to the sheriff of the county, commanding him to levy such sums as shall remain unpaid and unaccounted for by such collector, of the goods and chattels, lands and tenements of such collector, and to pay the same to the county treasurer, and return such warrant within forty days after the date thereof; which warrant the county treasurer shall immediately deliver to the sheriff of the county; but

no such warrant shall be issued by the county treasurer for the collection of monies payable to town officers, without proof, by the oath of such town officers, of the refusal or neglect of the collector to pay the same, or account therefor as above provided.

Execution of Warrant; Disposition of Monies.

§ 14. The sheriff to whom such warrant is directed, shall immediately cause the same to be executed, and shall make return thereof to the county treasurer, within the time therein specified, and shall pay to him the money levied by virtue thereof, deducting for his fees the same compensation that the collector would have been entitled to retain. Such part of the monies collected, if any, as ought to have been paid by the collector to town officers, shall be paid by the county treasurer to the town officers to whom the collector was directed to pay the same; but if the whole amount of monies due from the collector, shall not be collected in such warrant, the county treasurer shall first retain the amount which ought to have been paid to him, before making any payment to the town officers.

Sheriff's Return.

§ 15. If the whole sum due from the collector shall be collected, the sheriff shall so state in his return; but if a part only, or if no part of such sum shall be collected, the sheriff shall state in his return the amount levied, if any, exclusive of his fees, and shall also certify that such collector has no goods or chattels, lands or tenements, in his county, from which the monies, or the residue thereof, as the case may be, could be levied; [401] and in either case, the county treasurer shall forthwith give notice to the supervisor of the town or ward, of the amount due from such collector.

Collector's Bond, when to be Sued.

§ 16. The supervisors shall forthwith cause the bond of such collector to be put in suit, and shall be entitled to recover thereon the sum due from such collector, with costs of suit; and the monies recovered shall be applied and paid by the supervisor, in the same manner in which it was the duty of the collector to have applied and paid the same.

Where Sheriff Neglects to Make Return.

§ 17. If any sheriff shall neglect to return any such warrant, or to pay the money levied thereon, within the time limited for the return of such warrant; or shall make any other return than such as is above mentioned, the county treasurer shall forthwith proceed to collect, by attachment, the whole sum directed to be levied by such warrant.

Where County Treasurer Fails to Collect.

§ 18. In case the county treasurer shall fail to collect, such monies by attachment, he shall certify to the comptroller, that he has issued such warrant, stating its contents, that the sheriff has neglected to return the same, in the manner required by law, or to pay the money levied thereon, as the case may be, and that he has pursued the remedy, thereon, by attachment, without effect.

Where Sheriff to be Prosecuted.

§ 19. The comptroller shall give notice thereof to the attorney-general, who shall immediately prosecute such sheriff, and his sureties, for the sum due on such warrant; which sum, when collected, shall be paid to the treasurer of this state, and by him, on the comptroller's warrant, to the county treasurer.

Satisfaction of Collector's Bond.

§ 20. Upon the settlement of the amount of taxes, directed to be collected by any collector, in any of the towns or wards in this state (the city of New York excepted), the county treasurer shall, if requested, give to such collector, or to any of his sureties, a satisfaction piece in writing, and shall acknowledge the same, before some person authorized to take acknowledgments of the satisfaction of judgments in courts of record.

Entry of Record of Satisfaction.

§ 21. Upon the production of such satisfaction piece, acknowledged as aforesaid, the clerk of the county shall enter satisfaction of record of the collector's bond, which shall thereby be discharged.

Fees for Acknowledgment.

§ 22. The officers taking and entering such acknowledgment of satisfaction, shall be entitled to the same fees as for taking and entering acknowledgment of satisfaction of a judgment in the courts of common pleas.

ARTICLE SECOND.

[402]

OF THE PAYMENTS AND RETURNS TO BE MADE BY THE COUNTY TREASURERS, AND THE DUTY OF THE COMPTROLLER, AND OTHER OFFICERS THEREUPON.

ARTICLE THIRD.

[407]

OF SALES FOR UNPAID TAXES, AND THE CONVEYANCE AND REDEMPTION OF LAND SOLD.

[Articles two and three were repealed by chapter 298 of Laws of 1850 and a system of sales by County Treasurers substituted in place of sales by the Comptroller as directed by the Revised Statutes; the Law of

1850 was in turn repealed by chapter 427 of 1855 and the provisions of articles two and three of this chapter and title of the Revised Statutes were in substance re-enacted. See chapter 427 of 1855, *infra* page 33.]

Title IV.

REGULATIONS CONCERNING THE ASSESSMENT OF TAXES ON INCORPORATED COMPANIES, AND THE COMMUTATION OR COLLECTION THEREOF.

(This Title is omitted as containing nothing material to the present case.)

[418]

Title V.

MISCELLANEOUS PROVISIONS OF A GENERAL NATURE.

Town and City Clerks to Certify Names of Assessors.

SECTION 1. The clerks of the cities of New York, Albany, Hudson, Schenectady and Troy, and the town clerks of the several towns, shall yearly, before the first day of October, in each year, certify and deliver to the supervisors of their respective towns, the names of all the assessors and collectors in their respective cities and towns, and the same shall be delivered to the board of supervisors at their next meeting.

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Delinquencies of Clerks and Assessors.

§ 2. The boards of supervisors of the several counties, at every annual meeting, shall transmit to the comptroller the names and places of abode of the town clerks and assessors, in their respective counties, who shall have willfully refused or neglected to perform the duties required of them in this chapter; and the comptroller shall thereupon give notice to the district attorneys of the proper counties, to the end that they may

prosecute such delinquent town clerks and assessors, for the penalties incurred by them.

Securities Belonging to Residents of other States.

§ 3. When any bond, mortgage, note, contract, account or other demand, belonging to any person not being a resident of this state, shall be sent to this state for collection, or shall be deposited in this state for the same purpose, such property shall be exempt from taxation; and nothing contained in this chapter shall be construed to render any agent of such owner liable to be assessed or taxed for such property; but every such agent shall be entitled to have any such property deducted from his assessment, upon making affidavit, before the assessors at the time appointed by them for renewing their assessments, that such property belongs to a non-resident owner, and therein specifying his name and residence.

Remedy by Tenant for Taxes Paid.

§ 4. When the tax on any real estate shall have been collected of any occupant or tenant, and any other person, by agreement, or otherwise, ought to pay such tax, or any part thereof, such occupant, or tenant, shall be entitled to recover, by action, the amount which such person ought to have paid; or to retain the same from any rent due, or accruing from him to such person, for the land so taxed.

Losses by Collector or County Treasurer.

§ 5. All losses which may be sustained by the default of the collector of any town or ward, shall be chargeable on such town or ward. All losses which may be sustained by the default of the treasurer of any county, in the discharge of the duties imposed by this chapter, shall be chargeable on such county. And the

several boards of supervisors shall add such losses, to the next year's taxes of such town or county.

Cancellation of Erroneous Charge for United States Direct Tax.

§ 6. Whenever it shall appear to the comptroller, that any charge of arrears of the direct tax of the United States, returned to his office as unpaid, has been paid to any of the collectors of that tax, or that the same lands have been twice charged with the same tax, he shall cancel the erroneous charge on the books of his office.

Comptroller May Require Corrected Returns of Non-resident Lands.

§ 7. If, in consequence of having received irregular and imperfect descriptions of the lands of non-residents in any town, the comptroller shall apprehend that irregular or imperfect returns may again be received,
[420] he may give notice of such apprehension to the board of supervisors of the proper county, at their annual meeting, specifying the several towns in such county, the returns from which will probably require correction.

Duty of Supervisors Thereupon.

§ 8. It shall be the duty of such board of supervisors to require the assessors and the collector of such town, specified in the notice of the comptroller, to meet in such town at such place as shall be designated by the supervisors, within thirty days of the expiration of the time, when the collectors are to make their returns to the county treasurers.

Duty of Assessors and Collectors.

§ 9. It shall be the duty of the assessors and collectors to meet pursuant to such requisition. The col-

lectors shall specify to the assessors, the several lots to be returned as non-resident property, by reason of the non-payment of the taxes; and the assessors shall arrange the same according to the provisions of this chapter, and shall examine the descriptions of the lots; and in case any of them are found erroneous or imperfect, they shall correct the same, conformable to such instructions as may have been received from the comptroller, and the collector shall thereupon return the lots as arranged and described by the assessors, to the county treasurer.

Comptroller's Certificate or Deed.

§ 10. Every certificate or conveyance executed by the comptroller in pursuance of the provisions of this chapter, may be recorded in the same manner, and with the like effect, as a deed regularly acknowledged or proved, before any officer authorized by law, to take the proof and acknowledgment of deeds.

Sales for Taxes for Opening Roads.

§ 11. All sales of lands charged with taxes in arrear for opening and improving roads within this state, shall be conducted in the manner hereinbefore prescribed; and the owners of the lands sold, shall be allowed to redeem within the same time, and on the same conditions.

Comptroller to Issue Blank Forms and Instructions.

§ 12. The comptroller shall, from time to time, at his discretion, transmit blank forms of assessment-rolls, and of returns of unpaid taxes, to the several county treasurers in this state; together with such instructions as he shall think useful, for the purpose of enforcing the uniform and proper execution of this chapter.

Distribution of Forms and Instructions.

§ 13. The county treasurers shall distribute such of the said forms and instructions, as shall have been intended for the use of assessors, among the town clerks, in their respective counties, who shall deliver the same to the assessors in their respective towns. The county treasurer shall also transmit or deliver a copy of such forms and instructions to each of the assessors in any city in his county.

Copies of this Chapter to be Distributed.

§ 14. The comptroller shall, from time to time, whenever he shall find it to be necessary, cause to be printed, at the expense of this state, a sufficient number of copies of this chapter, to furnish one copy to each
[421] county treasurer, supervisor, town clerk, assessor and collector within this state; and shall transmit to each county treasurer a sufficient number for his county. Every county treasurer receiving such copies, shall immediately transmit, at the expense of the county, to the clerk of each town therein, five copies, to be distributed by him among the officers entitled thereto; and he shall also transmit or deliver one such copy to each assessor and collector, in every city in his county.

Punishment for Neglect of Duty.

§ 15. If any of the officers concerned in the execution of this chapter, shall willfully neglect or refuse to perform the duties assigned them, such officer shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine or imprisonment, or both, in the discretion of the court.

Title VI.

SPECIAL AND LOCAL PROVISIONS.

(This Title is omitted as not relating to Franklin County.)

LAWS OF 1851, CHAPTER 176.

AN ACT to amend the law for the assessment and collection of taxes.

SECTION 1. Section two, article one, title two, chapter thirteen, part first of the Revised Statutes in relation to the assessment and collection of taxes, is hereby amended so as to read as follows: "Land occupied by a person other than the owner, may be assessed to the owner or occupant, or as non-resident lands."

SEC. 2. Section five of the same title is hereby amended so as to read as follows: "Every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him including all personal estate in his possession or under his control as agent, trustee, guardian, executor or administrator, and in no case shall property so held under either of these trusts, be assessed against any other person, and in case any person possessed of such personal estate shall reside during any year in which taxes may be levied, in two or more counties, towns or wards, his residence for the purposes and within the meaning of this section, shall be deemed and held to be in the county, town or ward in which his principal business shall have been transacted, but the products of any state of the United States, consigned to agents in any town or ward of this state, for sale on commission, for the benefit of the owner thereof, shall not be assessed to such agent, nor shall such agents of moneyed corporations or capitalists be liable to taxation under this section, for any moneys in their possession or under

their control transmitted to them for the purposes of investment or otherwise."

SEC. 3. Sections fifteen, sixteen, twenty-two, twenty-three, twenty-four, twenty-five and twenty-six of the same title are hereby repealed, and section seventeen of the same title is hereby amended so as to read as follows: "All real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor."

SEC. 4. Section twenty of the same title is hereby amended so as to read as follows: Such notices set forth that the assessors have completed their assessment-roll, and that a copy thereof is left with one of their number at a place to be specified therein, where the same may be seen and examined by any person interested, until the third Tuesday of August; and that on that day the assessors will meet at a time and place also to be specified in such notice, to review their assessments. On the application of any person conceiving himself aggrieved, it shall be the duty of the said assessors on such day to meet at the time and place specified, and hear and examine all complaints in relation to such assessments that may be brought before them; and they are hereby empowered, and it shall be their duty to adjourn from time to time, as may be necessary to hear and determine such complaints; but in the several cities of this state, the notices, required by this section, may conform to the requirements of the respective laws regulating the time, place and manner for revising the assessments in said cities, in all cases where a different time, place, and manner is prescribed by said laws from that mentioned in this act.

Penalty for Neglect.

§ 5. If the assessors shall willfully neglect to hold the meeting specified in the last preceding section,* each assessor so neglecting shall be liable to a penalty of twenty dollars, to be sued for and recovered before any court having jurisdiction thereof, by the supervisor of the town, for the use of the poor of the same town; and in case of such neglect to meet for review, any person aggrieved by the assessment of the assessors may appeal to the board of supervisors, at their next meeting, who shall have power to review and correct such assessment.

Reduction of Valuation.

§ 6. Whenever any person on his own behalf, or on behalf of those whom he may represent, shall apply to the assessors of any town or ward to reduce the value of his real and personal estate, as set down in the assessment-roll, it should be the duty of such assessors to examine such person under oath touching the value of his or their said real or personal estate; and after such examination, and such other supplementary evidence, under oath, as shall be presented by the party or person aggrieved, they shall fix the value thereof at such sum as they may deem just under the rule prescribed by section* of this title; but if such person shall refuse to answer any question as to the value of his real or personal estate, or the amount thereof, or present sufficient supplementary evidence, under oath, to justify a reduction, the said assessors shall not reduce the value of such real or personal estate. The examination so taken shall be written, and shall be subscribed by the person examined, and shall be filed in the office of the town clerk of the town or city in which such assessment shall be made; and

[* Section 20, part 1, ch. 13, tit. 2, R. S.]

any person who shall willfully swear false on such examination before the assessors, shall be deemed guilty of willful and corrupt perjury. It shall also be the duty of the assessors, whenever the valuation fixed to* them, after such examination, shall exceed that sworn to by the aggrieved party or person, to indorse on the written examination, the words, "disagreed to by the undersigned assessors, under the rule prescribed for making assessments, by section fifteen, article two, title two, chapter thirteen, part one of the revised statutes, and in view of the obligations imposed by the deposition and oath, subscribed and made on the completion of the assessment-roll, to which this disagreement refers." It shall be the duty of the assessors on the same occasion, to furnish the aggrieved party or person a duplicate copy of the before mentioned written examination, together with the indorsement of disagreement aforesaid, duly signed.

Assessors May Administer Oaths.

§ 7. The assessors of the several towns and wards of this state, shall have power to administer oaths to any person applying to them under the provisions of the sixth section of this act.

Assessment-Roll, Form of Oath To.

§ 8. When the assessors or a majority of them, shall have completed their roll, they shall severally appear before one of the justices of the town or city in which they shall reside, and shall severally make and subscribe before such justice, an oath, in the following form: We, the undersigned, do severally depose and swear that we have set down, in the foregoing assessment-roll, all the real estate situated in the (town or ward as the case may be), according to our best information; and that, with the exception of those cases in

[So in original. As amended by L. 1857, ch. 536.]

which the value of the said real estate has been changed by reason of proof produced before us, we have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor; and also that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll, over and above the amount of debts due from such persons respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law from taxation, at the full and true value thereof, according to our best judgment and belief. Which oath shall be written on said roll, signed by the assessors, and certified by the justice, and shall be in place of the official certificate now required by law; and every assessor who shall willfully swear false in taking and subscribing said oath, shall be deemed guilty of, and liable to the penalties, of willful and corrupt perjury.

LAWS 1855, CHAP. 427.

AN ACT in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes.

Title I.

OF THE PAYMENTS AND RETURNS TO BE MADE BY THE COUNTY TREASURER, AND THE DUTY OF THE COMPTROLLER AND OTHER OFFICERS THEREUPON.

Treasurer to Pay County Debts.

§ 1. The treasurer of each county shall pay to the creditors of his county, from the moneys paid to him by the collectors, such sums, and in such manner as the board of supervisors shall have directed.

State Tax, When to be Paid.

§ 2. The several county treasurers shall, on or before the first day of March in each year, pay to the treasurer of this state, the amount of the state tax, if any, raised and paid over to them respectively, retaining the compensation to which they may be entitled.

How Paid.

§ 3. Such payment may also be made by depositing such money, to the credit of the treasurer of this state, in such banks in the cities of New York or Albany as shall have been designated by the comptroller, and shall then be entitled to receive the state deposits, and in case of such payment to either of those banks, the county treasurer making it, shall forthwith transmit a certificate of deposit to the comptroller, who shall thereupon certify such payment to the state treasurer, and charge him with the amount thereof.

Certificate of Unpaid Taxes.

§ 4. Whenever any county treasurer shall receive from a collector an amount of unpaid taxes assessed on lands of non-residents, such county treasurer shall compare the same with the original assessment-roll, which original rolls the collectors are required in all cases to return and deposit with their respective county treasurers; and if he finds it to be a true transcript thereof, he shall add to it a certificate showing that he has examined and compared the account with the assessment-roll, and found the same to be correct; and after crediting the collector with the amount, shall, before the first day of April next ensuing, transmit the account and collector's affidavit, to the comptroller, with a certificate that he has compared the account with the entries of the same taxes, in the original assessment-roll, and has found the same to be a true transcript of such roll.

Tax on Land Vacant by Removal of Occupant.

§ 5. If the taxes on any farm or lot of land, assessed to a resident, shall be returned as unpaid, in consequence of such premises becoming vacant by the removal of the occupant, before the collection of the tax imposed thereon, or in default of goods and chattels of the occupant to satisfy such tax, the supervisor of the town in which such land was assessed, shall add a description thereof to the assessmant-roll of the next year in the part thereof appropriated to taxes on lands of non-residents, and shall charge the same with the uncollected tax of the preceding year; and the same proceedings shall be had thereon, in all respects, as if it was the land of a non-resident, and as if such tax had been laid in the year in which the description is so added.

Non-resident Lands.

§ 6. Whenever the taxes upon the lands of a resident shall be returned for non-payment, as provided in the last preceding section, to the county treasurer, the collector shall annex to such return an affidavit, stating the reasons why such tax was not collected. Nothing in said last preceding section shall be so construed as to conflict with sections one, two and three of chapter four hundred and sixty-one, laws of eighteen hundred and thirty-six, but they shall be concurrent remedies.

Tax may be Paid to County Treasurer.

§ 7. Any person whose lands are assessed, may pay the tax assessed thereon to the treasurer of the county in which such lands were assessed, provided such payment be made to the county treasurer before he shall have made his annual return of the arrears of taxes to the comptroller. The county treasurer shall give a receipt for such payment, and shall also make return thereof to the comptroller.

Apportionment of State Tax.

§ 8. The comptroller shall, from the annual returns made to him of the valuations of real and personal estates in the several counties in this state, charge the several county treasurers with the amount of the state taxes, if any, to be raised in their respective counties, crediting them with their own fees; but no fees shall be allowed by the comptroller to the county treasurers, in adjusting the accounts of the county treasurers, for such portion of the state tax as is paid by credit given for taxes on non-resident property returned to him.

Lands Imperfectly Described.

§ 9. Whenever any account of arrears of taxes on the lands of non-residents shall be transmitted by a county treasurer to the comptroller, he shall examine them, and reject all taxes that shall be found to be charged on lands imperfectly described, and credit such county treasurer, in a book to be kept by the comptroller for that purpose, with the amount of all arrears of taxes which shall be admitted by him.

[Amended by L. 1878, ch. 152; page 68 *infra*.]

Arrears, how Adjusted with County.

§ 10. If the arrears so credited to the treasurer of any county shall exceed the state tax, if any, in said county, the comptroller shall cause the surplus, after deducting therefrom any balance which may be due from such county on account of taxes previously rejected by the comptroller, to be paid out of the treasury of this state, to the treasurer of the county; and the whole amount of taxes so to be assumed by the state, shall be collected for its benefit, in the manner hereinafter provided. If there be no state tax, the whole amount of such arrears, after deducting such balance as above mentioned, shall be paid to the county treasurer.

Accounts with County Treasurer.

§ 11. The comptroller shall state the accounts of the several county treasurers, on the first day of May in every year; and whenever any part of a state tax shall appear to be unpaid by any county treasurer, the comptroller shall transmit by mail to such county treasurer a copy of his account, requiring him to pay the balance within thirty days.

Proceedings on Failure of County Treasurer to Settle.

§ 12. If any county treasurer shall refuse or neglect to pay such balance within such time, the comptroller shall forthwith, (unless he shall be satisfied by due proof that such treasurer has not received such balance, and has taken all proper steps to collect the same,) deliver a copy of such county treasurer's account to the attorney-general, who shall prosecute forthwith; and the state shall be entitled to recover the balance due, with interest thereon, from the first day of May, in the year when the same ought to have been paid.

Treasurer's Bond to be Sued.

§ 13. The comptroller may also, in his direction, direct the board of supervisors of the proper county, to institute one or more suits on the bond of such treasurer and his sureties.

When Suits to be Discontinued.

§ 14. If the defendants in any suits to be brought under either of the last two preceding sections, shall at any time before judgment is obtained therein, pay the balance due the state, with interest, into the treasury, or account for the same to the comptroller, it shall be his duty, on payment of costs of suit, to direct such suits to be discontinued.

Statement of Arrears.

§ 15. It shall be the duty of the comptroller, on or before the first Tuesday in October, in every year, to furnish the boards of supervisors of the several counties, from which returns of arrears of taxes shall have been received at his office, with statements of the sums paid out of the state treasury, to their respective county treasurers, on account of such arrears during the year preceding.

Rejected Taxes, Statement of.

§ 16. The comptroller shall, on or before the first day of September in each year, transmit by mail or otherwise, to each county treasurer, a transcript of the taxes of the preceding year, assessed in any town of such county, which shall have been rejected by him, for any cause whatever, stating therein the cause of such rejection.

[Amended by L. 1878, ch. 152; page 69 *infra*.]

Taxes on Lands Imperfectly Described.

§ 17. Whenever the comptroller, after having transmitted such annual transcript, shall discover that any taxes credited to a county in the books of his office have been assessed on lands so imperfectly described, that the same can not, in his opinion, be located with certainty, he shall charge such taxes to the treasurer of the county in which such lands shall be, with the interest thereon, from the first day of March, in the year following that in which the taxes were laid, to the first day of February next after the discovery of such imperfect description.

[Amended by L. 1878, chap. 152; page 69 *infra*.]

Transcript to be Delivered to Supervisors.

§ 18. The comptroller shall also transmit, by mail, a transcript of the returns of such taxes, with the addi-

tion of such interest, to the proper county treasurer, who shall deliver the same to the supervisor of the town upon which such taxes are to be assessed, by whom it shall be delivered to the board of supervisors, at their next meeting. If the town upon which such taxes were originally assessed, shall have been divided since such assessment, the county treasurer shall deliver such transcript to the board of supervisors at their next meeting.

[Amended by L. 1878, ch. 152; page 69 *infra*.]

Description of Lands to be Made.

§ 19. Whenever the comptroller shall have rejected any tax, in the first instance, or have charged the same to a county, to which it shall have been credited, on account of any inaccurate or imperfect description of the lands on which such tax was laid, the supervisor of the town in which such lands are situate shall, if in his power, add to the next assessment-roll of such town an accurate description of such lands; and if necessary, may cause the survey of such lands at the expense of the town; and the board of supervisors shall charge them with the taxes and interest in arrears, stating the tax of each year separately, and shall direct the collection thereof; and such taxes and interest shall, for all the purposes of this act, be considered as the taxes of the year in which the description shall be perfected.

[Amended by L. 1878, ch. 152; page 70 *infra*.]

If not Made, Tax Assessed on Town.

§ 20. If an accurate description of such lands shall not have been added by such supervisor to the assessment-roll of his town the board of supervisors shall cause such arrears of taxes, and the interest thereon, to be levied on the valuations of the estate, real and

personal, of such town, as appearing by such assessment-roll, and shall direct the same to be collected with the other taxes of the same year.

[Amended by L. 1878, ch. 152; page 71 *infra*.]

How Assessed in Case of Division of Town.

§ 21. If the town in which such taxes were originally assessed, shall have been divided since such assessment, then such taxes and interest shall be apportioned by the board of supervisors among the towns included in the limits of such original towns, in such equitable manner as they may deem proper.

[Amended by L. 1878, ch. 152; page 71 *infra*.]

Tax, when Canceled.

§ 22. Whenever it shall be made to appear to the comptroller that any tax returned as unpaid was, previously to such return, paid to the collector or county treasurer, the comptroller shall cancel such tax on the books of his office; and if the same shall have been also paid into the state treasury, he shall cause it to be repaid out of the treasury, to the person by whom such payment shall have been made.

[Amended by L. 1885, ch. 453; page 84 *infra*.]

Account to be Transmitted to Supervisors.

§ 23. Whenever any tax shall be so canceled by the comptroller, he shall transmit an account thereof to the treasurer of the proper county, who shall cause the same to be laid before the board of supervisors thereof, and the amount of such tax with the interest shall be collected by them of the collector or county treasurer, who made such erroneous returns, and be paid into the treasury of this state.

Overpaid Taxes.

§ 24. Whenever it shall appear satisfactorily to the comptroller that the amount of any tax has been paid, and afterwards other money has been paid into the treasury of this state, on account of such tax; and in cases where it shall appear that the amount due for any tax has been overpaid, he may draw his warrant on the treasurer for the amount so overpaid, in favor of the person who may have made such payment.

Losses by Default.

§ 25. All losses which may be sustained by the default of the collector of any town or ward, shall be chargeable on such town or ward. All losses which may be sustained by the default of the treasurer of any county in the discharge of the duties imposed by this act, shall be chargeable to such county. And the several boards of supervisors shall add such losses to the next year's taxes of such town or county.

Interest on Unpaid Taxes.

§ 26. If any tax charged on lands of non-residents, or lands returned as under section five of this act, shall remain unpaid until the first day of August following the year in which they shall have been assessed, they shall thereafter be subject to a yearly interest, at the rate of ten per cent., until the same shall be duly paid or the lands sold, as hereinafter provided.

Certificate of Taxes Due.

§ 27. The comptroller shall, from time to time, give to any person requiring the same, a certificate of the amount of any tax, interest and charges, due on any tract, piece or parcel of land; and the state treasurer may receive such tax, interest and charges, and give a

receipt therefor upon such certificate, which shall be countersigned by the comptroller, and entered in the books of his office.

[Amended by L. 1878, ch. 152 ; page 71 *infra*.]

Persons may Pay Tax for their Interest in Lands.

§ 28. Whenever a sum in gross is assessed upon any tract, piece or lot of land, any person claiming a divided or undivided part thereof, may pay to the treasurer of the state any part of the tax, interest, and charges due thereon, proportionate to the number of acres claimed by him, on the certificate of the comptroller; and the remaining tax, interest and charges shall be a lien on the residue of the land only.

Map of Subdivisions.

§ 29. If the tract be subdivided, the person wishing to pay the tax upon a divided part of it, shall deliver to the comptroller a map of the subdivisions, if required by him.

Taxes, how Paid; Overcharges.

§ 30. Any person may pay the tax for any one year, and the interest and charges thereon, or any tract or lot of land, without paying the tax of any other year; and in case any tract or lot of land shall have been returned as containing a greater quantity of land than it shall actually contain, the amount overcharged shall be deducted, or if the tax shall have been paid according to such return, shall be refunded out of the treasury, on satisfactory proof being produced to the comptroller of the quantity actually contained in such tract or lot, at any time before the sale of such lands; but no such overcharge shall be cancelled, nor shall such over-payments be refunded unless application shall be made to the comptroller therefor within six years after the assessment of such overcharge.

Overcharges to be Recharged to County.

§ 31. If the whole amount of the tax, in case of the such overcharge, shall have been paid to the county treasurer, out of the treasury of this state, the comptroller shall charge the amount so refunded, with interest and charges thereon, to the treasurer of the county from which the tax was returned, and shall transmit an account thereof to him.

Town to be Liable Therefor.

§ 32. Such county treasurer shall deliver such account to the board of supervisors, at their then next meeting, who shall cause the amount thereof to be added to the proportion of the charges of the county to be raised in the town in which the tax was laid.

Title II.

Of Sales for Unpaid Taxes, and the Conveyance and Redemption of Land Sold, etc.

When Land to be Sold.

§ 33. Whenever any tax charged on lands returned to the comptroller, and the interest thereon, shall remain unpaid for two years from the first day of May following the year in which the same was assessed, the comptroller shall proceed to advertise and sell such land in the manner hereinafter provided.

[Amended by L. 1878, ch. 152; page 71 *infra*.]

List of Lands and Notice of Sale.

§ 34. He shall make out a list or statement of the lands charged with such tax and interest, and so liable to be sold; and shall cause so many copies thereof to be printed, as shall be sufficient to furnish each county treasurer with at least five copies, and each town clerk with at least two copies, and shall transmit to each

county treasurer such number of said copies as shall be equal to five copies for such county treasurer, and two copies for each town clerk in his county. And the comptroller shall also make and transmit to the county treasurer of each county, a list or statement of all the lands in such county charged with such tax and interest, who, in addition to publication in the state paper, shall cause the same to be correctly published and printed in each of the papers in his county designated by the board of supervisors for publishing the session laws, for the space of ten weeks prior to the commencement of such sale. If no newspaper shall have been designated to print the laws in any county, such list or statement shall be published in two newspapers of such county to be selected by the county treasurer; and if there shall not be two newspapers published in such county, then in two papers which the county treasurer shall ascertain to be most generally circulated in such county. But no error in the printed description in such newspapers shall vitiate or in any manner affect the validity of such sale; and all expenses of printing such list or statement shall be audited by the comptroller and paid out of the treasury of this state, on receiving one copy of the newspaper containing the same, with an affidavit of the publication of such list or statement according to the provisions of this section, to be made by the printer, publisher, or some person to whom the fact of such publication shall be known.

[Amended by L. 1878, ch. 152; page 72, *infra*.]

List, how Transmitted.

§ 35. The comptroller may employ agents or messengers to transmit to such of the county treasurers as he may think proper, the copies of such lists of lands liable to be sold for taxes; and the agents or messengers so employed shall require of each county

treasurer to whom they shall deliver such copies, an acknowledgment, in writing, of the receipt thereof; which acknowledgments shall be delivered by such agents or messengers to the comptroller, at least eighteen weeks before the commencement of the sale of the lands mentioned in such lists.

Compensation of Agents.

§ 36. The reasonable compensation of such agents or messengers shall be fixed by the comptroller, and paid out of the treasury; but the same shall not, in any case, exceed the amount of postage which would have been charged on the copies transmitted by such agents or messengers, if they had been transmitted by mail.

Expenses, how Charged.

§ 37. The expenses incurred by the state in printing and transmitting any list of lands liable to be sold for taxes, and in publishing notices of sale, shall be charged on the lands mentioned in said list, and shall be apportioned among the several tracts or parcels of such land, in such proportions as the comptroller shall deem just.

[Amended by L. 1878, ch. 152; page 73, *infra*.]

Copies in County Treasurer's Office.

§ 38. The county treasurers shall retain in their offices five of the copies transmitted to them, and shall permit all persons, at all reasonable hours, to examine the same; and shall cause the remaining copies to be delivered to the town clerks.

[Amended by L. 1878, ch. 152; page 73, *infra*.]

County Treasurer's Expenses.

§ 39. The expenses which may be incurred by the county treasurer, in the transmission of such lists, shall be audited and paid as contingent expenses of the county.

Notice by Town Clerks.

§ 40. Every town clerk to whom such copies shall be delivered, shall give notice at the opening of every town meeting for the election of town officers, that lists of all lands advertised for sale for taxes by the comptroller, are deposited in his office, and that they may be there seen and examined, at all reasonable hours, free of expense.

General Notice to be Published.

§ 41. After transmitting such lists to the county treasurers, the comptroller shall cause to be published, once in each week, for twelve weeks successively, in all the newspapers in this state, designated by the board of supervisors of the several counties for printing the laws, under the provisions of the act, entitled "An Act for the publication of the session laws in two newspapers in each county in this state," passed May fourteenth, one thousand eight hundred and forty-five, a general notice, stating that a list of all the lands liable to be sold for taxes has been forwarded to each of the county treasurers and town clerks in this state, and that so much of the said lands as may be necessary to discharge the taxes, interest, and charges which may be due thereon at the time of sale, will, on the day to be mentioned in such notice, and the succeeding days, be sold at public auction at the capitol in the City of Albany.

[Amended by L. 1878, ch. 152; page 73, *infra*.]

Affidavit of Publication.

§ 42. Every printer to whom such notice shall be transmitted for publication, shall, within twenty days after the last publication thereof, transmit to the comptroller an affidavit of due publication, made by some person to whom the fact of publication shall be known.

Maps of Lands Sold.

§ 43. Whenever the comptroller, preparatory to a sale of lands for taxes, shall deem it necessary, in order to test the correctness of the descriptions thereof, he may apply to the board of supervisors of any county, for maps of any tracts of land charged with taxes, and returned from such county. And the board of supervisors to whom such application shall be made, shall furnish such maps, at the expense of the county, if they can be procured, and if not, they shall then furnish such descriptions of the lands as they can obtain, with a statement of the quantity of each subdivision, if the same be divided.

[Amended by L. 1881, ch. 402; page 74, *infra.*]

Sale by Comptroller.

§ 44. On the day mentioned in the notices, the comptroller shall commence the sale of such lands, and shall continue the same from day to day, until so much of each parcel so assessed, shall be sold, as will be sufficient to pay the taxes, interest and charges thereon.

[Amended by L. 1881, ch. 402; page 76, *infra.*]

Payment by Purchaser; Default.

§ 45. The purchasers at such sale shall pay the amount of their respective bids to the state treasurer, within forty-eight hours after the last day of the sale; and if any such purchaser shall refuse or neglect to

pay the same within that time, the comptroller may state an account against him, and deliver it to the attorney-general, who shall be entitled to recover the same from the purchaser, by an action in the name of the people of this state; and for that purpose he shall forthwith cause a suit to be instituted therefor; or the comptroller may, in his discretion, re-sell the said lands upon which such bids so remaining unpaid were made, as hereinafter provided.

Certificate of Purchase.

§ 46. After such payment shall have been made, the comptroller shall give to the purchaser of any such lands a certificate in writing, describing the lands purchased, the sum paid, and the time when the purchaser will be entitled to a deed.

Cancellation of Sale for Non-payment.

§ 47. At any time after the expiration of three months from the conclusion of any sale of lands for taxes, pursuant to this act, when any purchaser at such sale shall not have paid the amount of his bid, or the same shall not have been collected from him, it shall be lawful for the comptroller to cancel such sale, by which all the rights of the said purchaser under such bid shall be extinguished.

New Certificate May be Issued.

§ 48. When the comptroller shall have cancelled any sale in the manner above provided, he may issue a certificate of such sale to any other person who will pay the amount for such certificate which would be payable by the original purchaser, in case the said sale had not been cancelled, or if such certificate cannot be sold, he may transfer the same to the people of the state.

[Amended by L. 1878, ch. 152 and L. 1881, ch. 402; pages 74 and 76 *infra*.]

Rights of New Purchaser.

§ 49. The change of purchaser shall be noted in the sales book, and the time when made; and the certificate issued to such new purchaser, shall confer the same right to him and his legal representatives, as he would have acquired had he been the successful bidder at the sale.

Time for Redemption.

§ 50. The owner or occupant of any land sold for taxes, or any other person, may redeem the same, as hereinafter provided, at any time within two years after the last day of such sale, by paying to the state treasurer, on the certificate of the comptroller, for the use of the purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest at the rate of ten per cent. per annum, from the date of such certificate.

[Amended by L. 1881, ch. 402; page 77, *infra*.]

Redemption of Undivided Parts.

§ 51. Any person claiming an undivided part of any tract, lot or piece of land sold for taxes, may redeem the same on paying as aforesaid, such proportion of the purchase money and interest as he shall claim of the lands sold.

Undivided Share of Undivided Parts.

§ 52. Any person claiming an undivided share in any tract or lot of land out of which an undivided part shall have been sold for taxes, may redeem his undivided share by paying as aforesaid, such proportion of the purchase money and interest as he shall claim of the lands sold.

Redemption of Specific Parts.

§ 53. Any person claiming a specific part of any tract, lot or piece of land sold for taxes, may redeem his specific part by paying as aforesaid, such proportion of the purchase money and interest as his quantity of acres shall bear to the whole quantity of acres sold.

Specific Parts of Undivided Tract.

§ 54. Any person claiming a specific part of any tract or lot of land out of which an undivided part shall have been sold for taxes, charged on the whole tract or lot, may redeem his specific part by paying as aforesaid, such proportion of the purchase money and interest as his quantity of acres shall bear to the whole quantity taxed.

Proportional Parts; Effect of Payment For.

§ 55. Any person claiming a specific part of any tract or lot of land out which a specific part belonging to some other person, shall have been sold for taxes charged on the whole tract or lot, may exonerate himself from all liability to contribute to the owner of the part sold, by paying as aforesaid, at any time before the expiration of the time allowed for the redemption, such proportion of the purchase money and interest as his quantity of acres shall bear to the whole quantity taxed; and such payment shall operate as redemption of a proportionate part, according to the amount paid, of the land sold.

Partial Redemptions.

§ 56. In every case of a partial redemption, pursuant to either of the last five sections, the quantity sold shall be reduced in proportion to the amount paid on such partial redemption; and the comptroller shall convey accordingly.

Taxes on Lands Conjointly Sold.

§ 57. Whenever the lands of any one person shall be sold for taxes assessed conjointly on the lands of such person and the lands of another person, and such other person shall not pay his due proportion under section fifty-two of this act, the person whose lands shall be sold may redeem the same on paying, as aforesaid, the purchase money and interest; and he shall be entitled to recover from such other person whose lands were assessed with his, a just proportion of the redemption moneys so paid, with lawful interest from the time of such redemption; but no suit shall be brought for the recovery of such proportion, until after the expiration of the time allowed for redemption.

Suits for Proportion of Value.

§ 58. If such owner shall not redeem the land sold, and the same shall be conveyed by the comptroller, such owner may recover from such other person the same proportion of the value of the land sold and conveyed, that he ought to have paid of the tax, interest and charges for which the land shall have been sold. In all actions under this or the last preceding section, the certificate of the state treasurer, countersigned by the comptroller, duly stating the facts in relation to such redemption or sale and conveyance, shall be presumptive evidence of such payment, and of all facts therein stated.

Lien of Judgment.

§ 59. Every judgment obtained under either of the last two sections, shall have priority, as against the lands of the defendant therein, on which the tax was assessed, and for which such proportional part ought to have been paid, to all mortgages executed, and all judgments recovered, since the twenty-third day of April, eighteen hundred and twenty-three.

Docket, how Made.

§ 60. But such judgment shall not be entitled to such priority, unless at the time of docketing the same the plaintiff cause an entry to be made by the clerk in the docket thereof, specifying that such judgment has priority, as a lien on certain lands, over mortgages and other judgments pursuant to the laws regulating the collection of taxes, which entry shall be a part of such docket.

Notice of Unredeemed Lands.

§ 61. The comptroller shall, at least six months before the expiration of the two years allowed for redemption prepare a notice for each county, in which there shall then appear to be any lands sold for taxes and unredeemed, specifying particularly every parcel remaining unredeemed, and the amount necessary to redeem the same, calculated to the last day on which such redemption can be made, and stating that unless such lands are redeemed by a certain day, they will be conveyed to the purchaser; and he shall cause such notice to be published once in each week, for at least six weeks successively, in the newspapers designated by the boards of supervisors of such counties respectively to publish the session laws; such publication to be in the body of the newspaper, and not in a supplement; and the said six weeks' publication to be completed at least eighteen weeks before the expiration of the two years allowed for the redemption. The boards of supervisors of the respective counties shall audit and pay the expenses of such publication.

Where no Newspapers Designated.

§ 62. If no newspapers shall have been designated to print the laws in any county in which such lands are situated, such notices, and lists or statements, shall be

transmitted and published, as above provided, in two newspapers of such county, to be selected by the comptroller; and if there shall not be two newspapers published in such county, then in the two newspapers which the comptroller shall believe to be most generally circulated in such county.

Deeds to be Executed of Lands Unredeemed.

§ 63. If no person shall redem such lands within such two years, the comptroller shall, at the expiration thereof, execute to the purchaser, his heirs or assigns, in the name of the people of this state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple; subject, however, to all the claims which the people of this state may have thereon for taxes, or other liens or incumbrances.

Lost Certificate.

§ 64. Whenever any certificate, given by the comptroller for lands sold for taxes, shall be lost, or wrongfully withheld by any person from the owner thereof, the comptroller may receive evidence of such loss or wrongful detention, and on satisfactory proof of the fact, may execute and deliver a deed to such person, as may appear to him to be the rightful owner of the land described in the certificate.

Conveyances, how Executed; Effect Of.

§ 65. Such conveyance, shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the deputy comptroller, surveyor general or treasurer, and all conveyances hereafter executed by the comptroller, of lands sold by him for taxes shall be presumptive evidence that the sale, and all proceedings prior thereto, from and including the assessment of the land, and all notices required by

law to be given previous to the expiration of the two years allowed to redeem, were regular, according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto.

[Amended by L. 1860, ch. 209 and L. 1885, ch. 448; pages 63 and 81, *infra.*]

Bids for the State.

§ 66. It shall be the duty of the comptroller to bid in for the state, at any sale of land for taxes, every lot of land by him put up for which no person shall offer to bid; and certificates of such sale shall be made by the comptroller, which shall describe the lands purchased, and specify the time when the people of this state will be entitled to a deed. Such purchases shall be subject to the same right of redemption as purchases by individuals; and if the lands sold shall not be redeemed, the comptroller, shall execute a release therefor, to the people of this state, or their assignees, which shall have the same effect, and become absolute in the same time, and on the performance of the like conditions, as in the case of sales and conveyances to individuals.

[Amended by L. 1881, ch. 402; page 79, *infra.*]

Sale of Lands Bid in by the Comptroller.

§ 67. At any time before the expiration of the two years allowed to redeem, the comptroller may sell and assign all the interest of the people of this state, in any or all such certificates as mentioned in the last preceding section, either at public or private sale, as to him may seem most for the interest of the people, to any person who shall forthwith pay into the state treasury the amount of the purchase money charged him by the comptroller; and the assignee of such certificate, if the lands therein described shall not be redeemed, shall be entitled to a deed therefor, which shall have the same effect, and become absolute in the

same time, and on the performance of the like conditions, as in the case of conveyances under the last preceding section.

Notice to Occupants.

§ 68. Whenever any lot or separate tract of land sold for taxes by the comptroller, and conveyed as hereinbefore provided, shall, at the time of the expiration of the two years given for the redemption thereof, or any part thereof, be in the actual occupancy of any person, the grantee to whom the same shall have been conveyed, or the person claiming under him, shall serve a written notice on the person occupying such land, within two years from the expiration of said time to redeem; stating in substance the sale and conveyance, the person to whom made, and the amount of the consideration money mentioned in the conveyance, with the addition of thirty-seven and a half per cent. on such amount, and further addition of the sum paid for the deed; and stating also, that unless such consideration money and the said thirty-seven and a half per cent., together with the sum paid for the deed, shall be paid into the treasury for the benefit of such grantee, within six months after the time of filing in the comptroller's office of the evidence of the service of the said notice, that the said conveyance will become absolute, and the occupant and all others interested in the land, be forever barred from all right or title thereto. And no conveyance made in pursuance of this section shall be recorded, until the expiration of such notice, and the evidence of the service of such notice shall be recorded with such conveyance.

Notice, how Served.

§ 69. Such notice may be served personally, or by leaving the same at the dwelling-house of the occupant, with any person of suitable age and discretion, belonging to his family.

Redemption by Occupant.

§ 70. The occupant, or any other person, may, at any time within the six months mentioned in such notice, redeem the said land, by paying into the treasury, such consideration money, with the addition of thirty-seven and a half per cent. thereon, and the amount that shall have been paid for the deed; and every such redemption shall be as effectual as if made before the expiration of the two years allowed to redeem the land sold.

Certificate of Redemption.

§ 71. Upon such redemption, as provided for in the last preceding section, the comptroller shall give to the person redeeming a certificate under his hand and seal, stating the payment, the year in which the sale was made, and showing particularly what land such payment is intended to redeem; and such certificate shall be evidence of such redemption, and may be recorded by the clerk of the county, in the book for the recording of deeds.

Affidavit of Service of Notice.

§ 72. In every case of actual occupancy, the grantee, or the person claiming under him, in order to complete his title to the land conveyed, shall within one month after the service of such notice, file with the comptroller a copy of the notice served, together with the affidavit of some person who shall be certified as credible, by the officer before whom such affidavit shall be taken, that such notice as is above required, was duly served, specifying the mode of service.

Comptroller's Certificate of Facts.

§ 73. If the comptroller shall be satisfied by such copy and affidavit that the proper notice has been duly served, and if the moneys required to be paid for the

redemption of such land shall not have been paid, as hereinbefore provided, he shall, under his hand and seal, certify such facts, and the conveyance before made shall thereupon become absolute ; and the occupant, and all others interested in said lands shall be forever barred of all right and title thereto.

Occupant May Redeem.

§ 74. The occupant of any such lot, or any other person may at any time before the service of said notice by the purchaser, or the person claiming under him, redeem any lands so occupied, by filing in the office of the comptroller satisfactory evidence of the occupancy required, and by paying to him the consideration money for which the lands to be redeemed were sold, and thirty-seven and a half per cent. thereon together with the sum paid for the deed, if any.

[Amended by L. 1885, ch. 453 and by L. 1890, ch. 556 ; pages 85 and 87, *infra.*]

Treasurer's Receipt, Comptroller's Certificate to be Evidence.

§ 75. Upon redemption being made, as permitted in the last preceding section, the receipt of the treasurer to whom the payment is made, accompanied by the comptroller's certificate, as required by section sixty-eight of this act, and further stating, that such redemption was made without notice, shall be presumptive evidence that such land has been correctly redeemed.

Effect of Sale on Mortgage Lien.

§ 76. No sale of real estate hereafter made for the non-payment of any tax or assessment, shall destroy, or in any manner affect the lien of any mortgage thereon, duly recorded or registered at the time of such sale, except as hereinafter provided.

Notice to Mortgagee.

§ 77. It shall be the duty of the purchaser at such sale, to give to the mortgagee a written notice of such sale, requiring him to pay the amount of the purchase money, with interest, at the rate rate allowed by law thereon, within six months after the giving of such notice.

[Amended by L. 1870, ch. 280; page 65, *infra*.]

Mortgagee's Lien.

§ 78. If such payment shall be made, the sale of shall be of no further effect, and the mortgagee shall have a lien on the premises for the amount paid, with the interest which may thereafter accrue thereon, at the rate of seven per cent. per annum, in like manner as if the same had been included in his mortgage.

Failure to Pay.

§ 79. In case the mortgagee shall fail to make such payment within the time so limited, he shall not be entitled to the benefit of section seventy-six of this act.

Mortgagee and Purchaser Defined.

§ 80. The term "mortgagee," as used in this act, shall be construed to include assignees whose assignment shall be duly recorded, and personal representatives; and the term "purchaser," shall be construed to include assignees, and real or personal representatives, as the case may be.

Notices, how Served.

§ 81. The notice required by section seventy-seven of this act may be given either personally or in the manner required by law, in respect to notices of non-acceptance or non-payment of notes or bills of ex-

change, and a notarial certificate thereof shall be presumptive evidence of the fact; such certificates may be recorded in the county in which the mortgage was recorded, in the same manner and with the same effect as is by law prescribed in respect to deeds or other evidences of title of real estate.

[Amended by L. 1870, ch. 280; page 67, *infra*]

Notices, to Whom Directed.

§ 82. The notice required to be given under the last preceding five sections, in cases of sales by the comptroller, shall be directed only to such persons as shall within two years from the time of such sale file in the office of the comptroller, a notice stating the name of the mortgagor and mortgagee, the date of the mortgage, and the amount claimed to be due thereon, and the county, town and tract in which the mortgaged premises are situated, with the number of the lot on which said mortgage is claimed to be a lien, with the name of the person or persons claiming notice, their residence, and the post-office to which such notice shall be addressed; in case such mortgagee or other person shall omit or neglect to file such notice with the comptroller within the said two years, then said mortgagee or other person shall be barred from all claim to redemption by virtue of said mortgage, and the title of the purchaser shall become valid and effectual the same as if such mortgage had not existed.

Invalid Sales.

§ 83. Whenever the comptroller shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever invalid or ineffectual to give title to the lands sold, the lands so improperly sold shall not be conveyed, but the comptroller shall cancel the sale, and forthwith cause the purchase

money and interest thereon to be refunded out of the state treasury to the purchaser, his representatives or assigns.

Error, how Charged.

§ 84. If the error originated with the county or town officers, the sum so paid shall be a charge against the county from which the tax was returned; and the board of supervisors shall cause the same to be assessed, levied, collected, and paid to the treasurer of this state.

Cancelling Sale and Refunding Money.

§ 85. If the discovery that the sale was invalid shall not be made until after the conveyance shall have been executed for the lands sold, it shall be the duty of the comptroller, on receiving evidence thereof, to cancel the sale, to refund out of the state treasury to the purchaser, his representatives or assigns, the purchase money, and interest thereon, and to recharge the county from which the tax was returned, with the amount of purchase money, and interest at the rate of seven per cent. from the time of the sale, and such county shall cause the same to be levied and paid, as provided in the last preceding section.

Expenses of Sale to be Apportioned.

§ 86. The expenses attending the sales for taxes out of this act, including a due proportion of the expenses of publishing lists and notices and transmitting copies thereof, and not hereinbefore provided for, shall be a charge on the lands out of which the sales are made; and an equal part of such expense shall be added to the taxes, interest, and other charges, on each parcel of land out of which a sale may be made.

[Amended by L. 1878, ch. 152; page 74, *infra*.]

Moneys to be paid into Treasury.

§ 87. The moneys received upon every such sale for taxes and interest, and also for the expenses of sale, shall be paid into the state treasury, and the accounts of persons entitled to any portion of the moneys so received, for such expenses, shall be audited by the comptroller, and paid out of the state treasury.

Neglect of Duty.

§ 88. If any of the officers concerned in the execution of this act, shall willfully neglect or refuse to perform the duties assigned them, such officer shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine or imprisonment, or both, in the discretion of the court.

Pay of County Treasurers.

§ 89. The county treasurers of the several counties of this state, shall not, after the thirty-first day of May next, receive any moneys in payment of the taxes of eighteen hundred and fifty-two and eighteen hundred and fifty-three, but they shall forthwith transmit to the state treasurer all money received by them in payment of such taxes, and the interest thereon up to that time, and shall at the same time furnish the comptroller with a full account of the same, exhibiting the lots, tracts, pieces, or parcels of land, particularly describing each as described in the books of his office, upon which such taxes were paid; the amount paid upon each, and the year for which such tax was paid; and if any part of such money shall have been paid on parts of lots or tracts, upon certificates made by the comptroller, the description of such part shall be the same as contained in such certificate.

Payments, how Credited.

§ 90. The comptroller shall, upon the receipt of such account, cause all payments therein to be duly credited to the several tracts, pieces or lots of lands so paid, on the books in his office, as specified by section thirty-nine of chapter two hundred and ninety-eight of the laws of one thousand eight hundred and fifty; and the comptroller shall, on and after the first day of June next, be invested with all the powers and duties relating to the collection of said taxes of one thousand eight hundred and fifty-two and one thousand eight hundred and fifty-three, and the sale of lands for non-payment of the same, as are conferred by this act in relation to unpaid taxes hereafter to be returned to, and admitted to the comptroller.

Exceptions.

§ 91. The provisions of this act (except sections two, three, eight, twelve, thirteen and fourteen), shall not in any manner affect or apply to the city and county of New York, the city of Albany, the city of Brooklyn, in the county of Kings, or the village of Williamsburgh, in said county of Kings; and in said sections the words "county treasurer" shall be construed to include the chamberlain of the city and county of New York.

Acts Repealed; Saving Clause.

§ 92. The act entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands in the counties where they are assessed," passed April ten, one thousand eight hundred and fifty, and the act entitled "An Act in relation to the publication of notices previous to the conveyance of lands sold for taxes," passed April six, one thousand eight hundred and

fifty, and all laws inconsistent with this act, are repealed; but the repeal or anything contained, (except section thirty, in relation to the cancellation of overcharged taxes, and sections eighty-nine and ninety, in relation to the taxes of the years one thousand eight hundred and fifty-two and one thousand eight hundred and fifty-three, shall not in any manner affect any tax levied or assessed in either of the years one thousand eight hundred and forty-nine, one thousand eight hundred and fifty and one thousand eight hundred and fifty-one, nor any proceeding for the collection thereof, by sale of the land taxed or otherwise; nor the rights of any person which have accrued or may accrue by reason of any such sale or proceeding, nor the powers of county treasurers in relation to the collection of the taxes of eighteen hundred and fifty-two and eighteen hundred and fifty-three, except as provided by sections eighty-nine and ninety, of this act above mentioned; and all taxes heretofore levied or assessed, which have been or shall be hereafter rejected by the comptroller, and shall be hereafter returned to him, after having been duly relaid or reassessed, with corrected descriptions, shall, for the purpose of this act, be deemed to have been levied and assessed in, and to be the taxes of the year in which the tax was so relaid and the description perfected.

LAWS 1860, CHAP. 209.

AN ACT to amend the act entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," passed April thirteenth, eighteen hundred and fifty-five.

Section Sixty-five Amended.

SECTION 1. Section sixty-five of the act, entitled "An act in relation to the collection of taxes on lands of

non-residents, and to provide for the sale of such lands for unpaid taxes," passed April thirteenth, eighteen hundred and fifty-five, shall read as follows:

Conveyance, how Executed; presumption.

Such conveyance shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the deputy comptroller, surveyor-general or treasurer, and all conveyances hereafter executed by the comptroller, of lands sold by him for taxes, shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto. But where the person or persons claiming title under such conveyance, or the grantees or assignees of such persons, shall be in possession of the land described therein, either by himself or themselves, or his or their grantees, assignees, agents, tenants or servants, then such conveyance shall be presumptive evidence of the facts above stated, whatever may be the date of such conveyance.

LAWS 1862, CHAP. 285.

AN ACT to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five.

Section Eighty-two Repealed.

SECTION 1. The eighty-second section of the act entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," passed April thirteenth, eighteen hundred and fifty-five, is hereby repealed.

Comptroller and Employees not to be Interested in Sales.

§ 2. It shall be unlawful for the comptroller of this state, and for any person employed in the office of such comptroller, to be interested directly or indirectly in any tax sale made by such comptroller, or in the title acquired by such sale, or in any money paid or to be paid for the redemption of any lands sold for taxes or on the concellation of any tax sale; and it shall be unlawful for any person to pay to the comptroller or to any employee in his office, and for the said comptroller or any employee in his office to receive, directly or indirectly any compensation, reward or promise thereof, from any person or persons who are interested in any purchase or purchases of lands sold for taxes, for any service or services performed or to be performed in regard to such sale, redemption, cancellation or such tax title. If any person offend against any provision of this section, he shall be deemed guilty of a misdemeanor; and the sale by the comptroller of any lands in which such person shall be interested contrary to the provision of this section, is hereby declared to be void.

LAWS 1870, CHAP. 280.

AN ACT to amend an act passed April thirteenth, eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Right of Mortgagee to Redeem; Section Repealed.

SECTION 1. A mortgagee whose mortgage is duly recorded, or the assignee of any mortgage whose assignment is duly recorded, and the personal representatives of such mortgagee or assignee, who shall have filed with the comptroller, as required by law, a notice and description of his mortgage, may, at any time after the

sale of all or any part of the mortgaged premises for unpaid taxes, and before the expiration of six months from the giving of the notice required by section seventy-seven of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," may redeem the said premises so sold, or any part thereof, from the said sale. If the said sale shall have been made by the comptroller, such redemption shall be made by paying to the state treasurer, upon the certificate of the comptroller, for the use of the purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest at the rate allowed by law in the case of redemption by occupants from the date of such certificate; and, if the said sale shall have been made by a county treasurer, or other county officer, the redemption shall be made by paying to the county treasurer the amount for which said lands were sold, with interest at the same rate from the day of sale. The mortgagee or assignee of a mortgage or other person redeeming lands sold for unpaid taxes, as authorized by this section, shall have a lien on the premises so redeemed for the amount paid, with interest thereon from the time of such payment, at and after the rate of seven per centem per annum, in like manner as if the same had been included in the mortgage. Section one of chapter two hundred and eighty-five of the laws of eighteen hundred and sixty-two, entitled "An Act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five," passed April seventeenth, eighteen hundred and sixty-two, is hereby repealed.

Section Seventy-seven of Chapter 427, *Laws of* 1855, *Amended.*

§ 2. Section seventy-seven of chapter four hundred and twenty-seven of the laws of eighteen hundred and

fifty-five, mentioned in the first section of this act, is hereby amended by adding thereto these words: "Such notice may be given at any time after the expiration of two years from the last day of such sale."

Section Eighty-one of Same Act Amended.

§ 3. Section eighty-one of said chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five is hereby amended by adding thereto the following paragraph:

"A copy of such notice served, together with the affidavit of some person, who shall be certified as credible by the officer before whom such affidavit shall be taken, that such notice was duly served, specifying the mode of service, shall be filed in the office of the comptroller within one month after such service."

LAWS 1873, CHAP. 120.

AN ACT conferring certain additional powers upon the comptroller.

Comptroller May Set Aside Cancellation of Sale.

SECTION 1. The comptroller of the State of New York shall have the power to set aside any cancellation of sale made by him under the provisions of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled, "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes" in either of the following cases: First. Whenever such cancellation was procured by fraud or misrepresentation. Second. Whenever such cancellation was procured by the suppression of any material fact bearing upon the case. Third. Whenever the cancellation was made under a mistake of fact. But the comptroller

shall in all cases specify the particular grounds upon which said cancellation is set aside.

LAWS 1878, CHAP. 152.

AN ACT further to amend section two of title two of chapter thirteen of part one of the Revised Statutes, entitled, "Of the assessment and collection of taxes," and to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

SECTION 1. Section two of title two of chapter thirteen of part one of the revised statutes, as amended by chapter one hundred and seventy-six of the laws of eighteen hundred and fifty-one, is hereby amended so as to read as follows:

§ 2. Lands occupied by a person other than the owner may be assessed to the occupant, as lands of non-residents, or, if the owner resides in the county in which such lands are located, to such owner.

Certain Sections of Act Amended.

§ 2. Sections nine, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-seven, thirty-three, thirty-four, thirty-seven, thirty-eight, forty-one, forty-eight and eighty-six of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, are hereby amended so as to read as follows:

Lands Imperfectly Described.

§ 9. Whenever any account of arrears of taxes on lands of non-residents shall be received by the comptroller from a county treasurer, he shall examine

such account and reject all taxes entered thereon, that shall be found to be erroneous, and all taxes found thereon charged on lands erroneously or imperfectly described, and shall credit such county treasurer in a book to be kept by him for that purpose, with the amount of all arrears of taxes which shall be admitted by him.

Rejected Taxes.

§ 16. The comptroller shall, on or before the first day of September in each year, transmit by mail or otherwise, to each county treasurer, a transcript of the taxes, of the preceding year, assessed in any town or ward in such county, which shall have been rejected by him for any cause whatever, stating therein the cause of such rejection.

Taxes on Lands Imperfectly Described.

§ 17. Whenever the comptroller, after having transmitted such annual transcript, shall discover that any taxes credited to a county in the books of his office are erroneous, or that they have been assessed on land erroneously described or so imperfectly described that they can not, in his opinion, be located with certainty, he shall cancel such taxes on the books of his office and charge them to the county in which such lands shall lie, with the interest thereon from the first day of March, in the year following that in which the taxes were laid to the first day of February next after such cancellation.

Transcript to be Delivered to Supervisors.

§ 18. The comptroller shall also transmit, by mail or otherwise, a transcript of the returns of such taxes, with the addition of such interest, to the proper county treasurer who shall deliver the same to the supervisor

of the town or ward in which such taxes were assessed, by whom it shall be delivered to the board of supervisors at their next meeting. If the town or ward, in which such taxes were originally assessed shall have been divided since such assessment, the county treasurer shall deliver such transcript to the board of supervisors at their next meeting.

Description of Lands to be Made.

§ 19. Whenever the comptroller shall have rejected any tax in the first instance, or have cancelled and charged the same to a county to which it had previously been credited, the supervisor of the town or ward in which such lands are situate, shall, if in his power, add to the assessment-roll of such town or ward for the year during which such transcript shall have been forwarded by the comptroller to the county treasurer, an accurate description of such lands and the correct amount of taxes thereon, stating the tax of each year, and each kind of tax, separately, and shall furnish the comptroller with all such maps and surveys of such lands as shall have been required by him; and, if necessary, he may cause a survey and map of each lot or parcel returned for more perfect description to be made and the expense of such survey and map shall be a charge upon such land to be added to the tax thereon, and the board of supervisors shall direct the collection of such taxes and expenses so added to such assessment-roll, and they shall, for all the purpose of this act, be considered as the taxes of the year in which the description shall be perfected. If the supervisor of such town or ward shall not have fully complied with the requirements of this section, the comptroller shall not thereafter admit, but shall reject all such reassessed, cancelled or rejected taxes as may be returned to him.

If not Made, Tax to be Assessed upon Town.

§ 20. If the correct amount of such taxes and an accurate description of such lands shall not have been added, by such supervisor, to the assessment-roll of his town or ward for the year during which such transcript shall have been forwarded by the comptroller to the county treasurer, the board of supervisors shall cause such arrears of taxes and the interest thereon, to be levied on the valuations of the estates, real and personal, of the town or ward in which such taxes were originally assessed, and shall direct the same to be collected with the other taxes of the same year.

Where Town or Ward since Divided.

§ 21. If the town or ward in which such taxes were originally assessed shall have been divided since such assessment, then such taxes and interest shall be apportioned by the board of supervisors among the towns and wards included in the limits of such original towns or wards in such equitable manner as they may deem proper.

Certificate of Taxes Due.

§ 27. The comptroller shall, from time to time, give to any person desiring to pay the taxes, interest and charges due on any tract, piece or parcel of land, a certificate of the amount of such taxes, interest and charges ; and the state treasurer may receive such taxes, interest and charges and give a receipt therefor upon such certificate, which shall be countersigned by the comptroller, and entered in the books of his office.

Land, when to be Sold.

§ 33. Whenever any tax charged on lands returned to the comptroller, and the interest thereon shall remain unpaid for two years from the first day of May, follow-

ing the year in which the same was assessed, the comptroller shall, as soon thereafter as he shall deem it for the best interests of the state, proceed to advertise and sell such lands in the manner hereinafter provided.

List of Lands and Notices of Sale.

§ 34. He shall make out a list or statement of the lands charged with such tax and interest and so liable to be sold, and shall cause so many copies thereof to be printed as shall be sufficient to furnish each county treasurer with at least five copies, and each town and city clerk with at least two copies, and shall transmit to each county treasurer such number of said copies as shall be equal to five copies for such county treasurer and two copies for each town and city clerk in his county. And the comptroller shall also make and cause to be printed and published in two public newspapers to be selected by him in each county, once in each week, for ten successive weeks prior to the commencement of the sale, a list or statement of all the lands in such county charged with such tax and interest. Such publication shall be in the body of each newspaper, and not in a supplement. If there shall not be two newspapers, known to the comptroller, published in any county, such list or statement shall be published as required above, in the two newspapers which the comptroller shall believe to be most generally circulated in such county. But no error in the printed description in such newspapers shall vitiate or in any manner affect the validity of such sale; and all expenses of printing such lists or statements shall be audited by the comptroller, and paid out of the treasury of this state, on receiving one copy of the newspaper containing the same, with an affidavit of the publication of such list or statement according to the provisions of this section, to be made by the printer, publisher or some other

person to whom the fact of such publication shall be known.

Expenses, how Charged.

§ 37. The expenses incurred by the state in printing and transmitting any list of lands liable to be sold for taxes, and in publishing notices of sale and lists or statements of such lands, shall be charged on the lands mentioned in such lists; and an equal part of such expense shall be estimated and apportioned by the comptroller and charged on each of the several tracks or parcels of such land.

Copies in Treasurer's Office.

§ 38. Each county treasurer shall retain in his office five of the copies of the list or statement of lands to be sold, transmitted to him, and shall permit all persons at all reasonable hours to examine the same, and shall cause the remaining copies to be delivered to the town and city clerks.

General Notice.

§ 41. After transmitting such lists to the county treasurers, the comptroller shall cause to be published, once in each week, for twelve weeks successively, in two newspapers in or for each county, to be selected by him in the same manner as is provided in section thirty-four of this act for selecting newspapers to publish the lists of lands liable to be sold, a general notice, stating that a list of all the lands liable to be sold for taxes has been forwarded to each of the county treasurers and town and city clerks in this state, and that so much of said lands as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale, will, on a day to be mentioned in such notice, and the succeeding days be sold at public auction at the capitol in the city of Albany.

New Certificate of Sale.

§ 48. When the comptroller shall have cancelled any sale in the manner provided in section forty-seven of this act, he may issue a certificate of such sale to any other person who will pay the amount for such certificate which would be payable therefor by the original purchaser in case the said sale had not been cancelled, or if such certificate can not be sold, he may transfer the same to the people of the state; but in all cases where the people of the state becoming the purchasers by such transfer, the whole quantity of land liable to sale for the purchase-money mentioned in such certificate shall be covered by such purchase, the same as if no person had offered to bid therefor at the sale.

Expenses of Sale.

§ 86. The expenses attending the sales for taxes made under this act, including a due proportion of the expenses of printing and publishing lists and notices and transmitting copies thereof, not hereinbefore provided for, shall be a charge on the lands out of which the sales are made, and an equal part of such expense shall be estimated by the comptroller, and added to the taxes, interest and other charges on each parcel of land out of which a sale may be made.

LAWS 1881, CHAP. 402.

AN ACT further to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Section Forty-three Amended.

SECTION 1. Section forty-three of chapter four hundred and twenty-seven of the laws of eighteen hundred

and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as as to read as follows:

Comptroller may Apply for Maps; Lists to be Transmitted.

§ 43. 1. Whenever the comptroller, preparatory to a sale of lands for taxes, shall deem it necessary in order to test the correctness of the descriptions thereof, he may apply to the board of supervisors of any county for maps of any tracts of land charged with taxes, and returned from such county. And the board of supervisors to whom such application shall be made shall furnish such maps, at the expense of the county, if they can be procured, and if not, they shall then furnish such descriptions of the lands as they can obtain, with a statement of the quantity in each subdivision, if the same be divided.

2. It shall be the duty of the treasurer of each of the counties of Cattaraugus, Chautauqua, Monroe, Oswego, Suffolk and Sullivan, and of every other county for which there may, at the time, be a special law authorizing and directing the treasurer thereof to sell "lands of non-residents" for unpaid taxes thereon and by and under the provisions of which such taxes are not to be returned to the comptroller, and he is hereby required to transmit to the comptroller, at least one month prior to any state tax sale, a certified list and statement of all lands bid in the name of his county at, or transferred to his county from, any tax sale, or to which his said county may have acquired tax title, the deed for which has not been recorded in the office of the clerk of his said county, which may then be liable to be sold at said sale.

3. It shall be the duty of the clerk of each of the several counties of this state, and he is hereby required

to transmit to the comptroller, on the receipt of a list of the lands liable to be sold at any state tax sale, and at least one month prior to such sale, a certified list of all lands then on record in his office, or lands the deeds for which are in his office for record, then owned by his said county, and liable to be sold at such sale.

Section Forty-four Amended.

§ 2. Section forty-four of said act is hereby amended so as to read as follows:

Comptroller to Sell Lands.

§ 44. On the day mentioned in the notices, the comptroller shall commence the sale of such lands, and shall continue the same from day to day, until so much of each parcel shall be sold as will be sufficient to pay all the taxes due thereon for the years for the taxes of which said sale shall be made, with the interest and charges thereon; but no lot, piece or parcel of land against which the people of the state of New York then hold a bond or lien, for any part of the purchase-money thereof, or unpaid interest thereon, shall be sold at such sale.

Section 48 *Amended.*

§ 3. Section forty-eight of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, as amended by chapter one hundred and fifty-two of the laws of eighteen hundred and seventy-eight is hereby amended so as to read as follows:

Cancelled Certificates; Re-sale.

§ 48. When the comptroller shall have cancelled any sale in the manner provided in section forty-seven of this act, he may issue a certificate of such sale to any other person who will pay the amount for such certifi-

cate which would be payable therefor by the original purchaser, in case the said sale had not been cancelled, or, if such certificate can not be sold, he shall transfer the same, if the land described thereon is in the county of Cattaraugus, Chautauqua, Monroe, Oswego, Suffolk, Sullivan or any other county for which there may, at the time, be a special law authorizing and directing the treasurer thereof to sell "lands of non-residents" for unpaid taxes thereon, and by and under the provisions of which such taxes are not to be returned to the comptroller, to said county in which said land is located; but if it be located in any other county, he shall, in such case, transfer the same to the people of the state; but in all cases where either a county or the people of the state became the purchaser by such transfer the whole quantity of land liable to sale for the purchase-money mentioned in such certificate shall be covered by such purchase, the same as if no person had offered to bid therefor at the sale.

Section Fifty Amended.

§ 4. Section fifty of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five is hereby amended so as to read as follows:

Redemption of Lands Sold for Taxes; Lands not to be Despoiled.

§ 50. The owner or occupant of any land so sold for taxes, or any other person, may redeem the same, as hereinafter provided, at any time within two years after the last day of such sale, by paying to the state treasurer, on the certificate of the comptroller, for the use of the purchaser, his heirs or assigns, the sum mentioned in the certificate of sale therefor, with interest thereon at the rate of ten per centum per annum, from the date of such certificate of sale; but until such redemption shall be made, neither such owner nor occupant, nor any other person, shall have any right to de-

spoil such land of its value by the destruction or removal of any building, or by the cutting, removal or destruction of timber or other valuable products growing, existing, or being thereon. The purchaser of any wild, vacant or unoccupied land at such sale, or the assigns of such purchaser, shall have no right or authority to enter upon or exercise acts of ownership over such land, until the expiration of the two years allowed for the redemption thereof from such sale; but such purchaser, whose bid therefor shall have been fully paid, or the assignee or representative of such purchaser at such sale may, at any time within twenty-three months from the last day of said sale, serve, or cause to be served, a notice on any person despoiling said land, or any person interested in such despoilation; which notice may be served personally or by leaving the same at the residence of such person with any member of his family of suitable age and discretion, and shall state that such land, describing it substantially as sold, was sold for taxes by the comptroller, and that unless the said land be redeemed within one month from the date of the service of such notice, an action to recover the value of the buildings or products destroyed or removed therefrom from the date of the said sale thereof will be instituted against any or all persons concerned in such depredations. And, if such land shall not be redeemed from said sale within one month from the day of the service of such notice, then the person or persons engaged or interested in making such depredations shall be liable, if adjudged guilty by the court before which such action is held to pay to the holder of the said tax sale certificate therefor, the full value of any building so destroyed or removed therefrom, and of the timber, bark or other products so cut, destroyed or removed therefrom, from the date of the said tax sale of said land to the termination of said action.

Section Sixty-six Amended.

§ 5. Section sixty-six of said act is hereby amended so as to read as follows:

When Comptroller to Bid in; Certificates; Deeds.

§ 66. 1. It shall be the duty of the comptroller, at any tax sale held by him, to bid in for the state all lands liable to sale thereat then belonging to the state or that are then mortgaged to the commissioners for loaning certain moneys of the United States; and to bid in for each of the counties of the state all other lands liable to be sold thereat then belonging to said counties, respectively, and also all lands which may have been bid in by or for said counties, respectively, at any tax sale which has not been cancelled, or from which said lands may not have been duly redeemed, and to reject any and all other bids which may be made for any or all of said lands.

2. It shall further be the duty of the comptroller, at any such sale, to bid in for each of the counties of Cattaraugus, Chautauqua, Monroe, Oswego, Suffolk and Sullivan, and for all other counties for which there may at the time be special laws authorizing and directing the treasurer thereof to sell "lands of non-residents" for unpaid taxes thereon and by and under the provisions of which such taxes are not to be returned to the comptroller, respectively, every lot of land in each of said counties, respectively, liable to be sold at said sale, for which no person shall offer to bid, and to bid in for the state every other lot of land liable to be sold at said sale for which no person shall so offer to bid.

3. Certificates of sale for all lands bid in by the comptroller under the provisions of subdivisions one and two of this section shall be made by the comptroller, which shall describe the lands purchased and

specify the time when a deed therefor can be obtained. Such purchases shall be subject to the same right of redemption as purchases by individuals; and if the lands so sold shall not be redeemed, the comptroller's deed therefor shall have the same effect, and become absolute in the same time, and on the performance of the like conditions, as in the case of sales and conveyances to individuals.

4. The comptroller shall charge to each county, respectively, on the books of his office, the amount for which it may be liable, by reason of any and all purchases made in accordance with the preceding provisions of this section. Such amount shall become due on the last day of each tax sale, respectively, and shall be payable in the same manner as the state tax is now required by law to be paid.

5. The comptroller shall, as soon as practicable after each tax sale, transmit the certificates of sale for said lands to the treasurer of each of said counties respectively, on receipt of which, said treasurer shall enter the same, in their proper order, in a book to be provided by him for such purpose, and shall have, unless otherwise directed by the board of supervisors of his county, full power and authority, until the expiration of two years from the last day of said sale, to sell and assign any or all of said certificates for any land not at the time owned by his county, on payment therefor, into the county treasury, of the amount for which the land described thereon was sold at said tax sale, with interest thereon from the date of such tax sale to the date of such sale and assignment by him. Any such sale and assignment shall be duly and fully entered by such county treasurer in the book aforesaid, which book shall be a part of the records of the county.

6. In case said tax sale certificate or certificates shall not have been sold or assigned by the respective

county treasurers on or before the expiration of two years from the last day of said sale, each of said county treasurers shall then transmit such unsold certificate or certificates to the comptroller, who shall issue to the board of supervisors of each county, respectively, a deed or deeds for all the lands described thereon then remaining unredeemed, or the sale of which has not been cancelled. The title thus acquired by the boards of supervisors shall be held by them in trust for their respective counties, and may be disposed of by them at such times and on such terms as shall be determined on by a majority of such board at any regular or special meeting thereof.

Inconsistent Acts Repealed.

§ 6. All acts and parts of acts inconsistent with the provisions of this act, are hereby repealed.

LAWS 1885, CHAPTER 448.

AN ACT to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Section Sixty-five of Act Amended.

SECTION 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as read as follows:

Comptroller to Execute Conveyance; Evidence.

§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution

thereof shall be witnessed by the treasurer or deputy comptroller, and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

Act Applicable Only to Certain Counties.

§ 2. The provisions of this act are hereby made applicable only to the following counties, namely: Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

[This section amended by L. 1891, ch. 217, and L. 1893, ch. 398; pages 89 and 92, *infra*.]

LAWS 1885, CHAP. 453.

AN ACT further to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Section Four of Act Amended.

SECTION 1. Section four of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

Return of Unpaid Taxes on Non-resident Lands; Evidence.

§ 4. Whenever any county treasurer shall receive from a collector an account of unpaid taxes assessed on lands of non-residents, such county treasurer shall

compare the same with the original assessment-roll to which the collector's warrant is attached, which rolls the collectors are required in all cases to return and deposit with their respective county treasurers; and if he finds it to be a true transcript thereof he shall add to it a certificate showing that he has examined and compared the account with said roll and found the same to be correct; and after crediting the collector with the amount, shall, before the first day of April next ensuing, transmit the account and collector's affidavit to the comptroller, with a certificate that he has compared the account with the entries of the same taxes in the original assessment-roll to which the collector's warrant is attached, and has found the same to be a true transcript of such roll. The comptroller may, before admitting any taxes thereon, return such accounts to the respective county treasurers for correction or completion, which must be returned to him within one month thereafter, or as the comptroller may otherwise direct, and such account, when accepted by the comptroller, shall be deemed conclusive evidence of the regularity and validity of all taxes thereon which may be admitted by him and of all prior proceedings in assessing the lands and levying and collecting such taxes, except in cases when it shall be satisfactorily proven to the comptroller that any such tax was duly paid in the county, or was levied on an assessment of land by a town or ward having no legal right to assess the same, or arose from a double assessment, the taxes levied on one of which were duly paid.

Section Twenty-two Amended.

§ 2. Section twenty-two of said chapter is hereby amended so as to read as follows:

Cancellation of Tax; Relevy; Evidence.

§ 22. Whenever it shall be made to appear to the comptroller that any tax returned as unpaid was, pre-

viously to such return, paid to the collector or county treasurer, the comptroller shall cancel such tax on the books of his office; and if the same shall also have been paid into the state treasury, he shall cause it to be repaid out of the treasury to the person by whom such payment shall have been made. Whenever any unpaid tax, levied upon an assessment of land by a town or ward having a legal right to assess the same, which may have been returned to and admitted by the comptroller, shall be ascertained, either before or after sale therefor, to be illegal or void by reason of any irregularity or defect in, or omission of, statutory requirements for creating or collecting such tax, the comptroller is hereby empowered and directed, whenever deemed practicable by him, to relevy the correct amount of such tax and add thereto the five per cent allowed by law to be added by the collector, which aggregate amount of tax and charge, with interest thereon at ten per cent per annum from the first day of August following the admission of such illegal or void tax, shall thereupon be due and payable, and shall be subject to existing provisions of law governing the collection of and sale for unpaid taxes by the comptroller; but no tax arising from a double assessment, the taxes levied on one of which shall be satisfactorily proven to the comptroller to have been duly paid, shall be subject to such relevy. Such relevy of any invalid or defective tax shall be conclusive evidence of its regularity and legality, and any such tax, so relevied, shall be treated and subject to payment as though such sale had not been made, and, if allowed to remain unpaid, the land shall be sold therefor.

Section Seventy-four Amended.

§ 3. Section seventy-four of said chapter is hereby amended so as to read as follows:

Redemption after Sale.

§ 74. The occupant of any such lot, or any other person, may, at any time before the service of said notice by the purchaser, or the the* person claiming under him, redeem any lands so occupied, by filing in the office of the comptroller satisfactory evidence of the occupancy required and by paying to him the consideration money for which the lands to be redeemed were sold, and thirty-seven and a half per cent. thereon, together with the sum paid for a deed, if any, and such amounts as may have been paid to the state for subsequent taxes thereon, or for redemptions from subsequent tax sales thereof, and, in addition thereto, providing such lot has been legally exempt from taxation for one or more years subsequent to the sale in question, of a sum that would represent the gross amount of taxes, and interest that would have been due thereon, providing it had been taxed, during each of the years it may have been so exempt, on its assessed valuation, and at the rate per cent. of taxation thereon for the year when last returned to the comptroller's office.

Additional Section.

§ 3. Said chapter is hereby amended by the addition thereto of the following section :

After Advertisement, Lands to be Deemed in Possession of State.

§ 93. From and after the advertisement, once a week for three successive weeks, of a list of wild, vacant or forest lands, to which the state holds title from a tax sale or otherwise, in one or more newspapers to be selected by the comptroller, published in the county in which such lands may be located, all of such wild,

* So in the original.

vacant or forest lands shall be deemed, and are hereby declared to be, in the actual possession of the comptroller of this state; and such possession shall be deemed to continue until he has been dispossessed by the judgment of competent tribunal.

[Repealed by chap. 711 of 1893, but re-enacted as section 13 of that act. See page 104, *infra*.]

Act not Applicable to Certain Counties.

§ 5. The provisions of this act shall not apply to the counties of Cattaraugus and Chautauqua.

LAWS 1890, CHAP. 556.

AN ACT further to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

Section Seventy-four of Act Amended.

SECTION 1. Section seventy-four of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes, as amended by chapter four hundred and fifty-three of the laws of eighteen hundred and eighty-five, is hereby further amended so as to read as follows:

Redemption of Lands by Occupant.

§ 74. The occupant of any such lot, or any other person may at any time before the service of said notice by the purchaser or the person claiming under him, and within three years from the expiration of the two years allowed by law for the redemption thereof, redeem any lands so occupied, by

filing in the office of the comptroller satisfactory evidence of the occupancy required, and by paying to him the consideration money for which the lands to be redeemed were sold, and thirty-seven and one-half per centum thereon together with the sum paid for a deed, if any, and such amount as may have been paid to the state for subsequent taxes thereon, or for redemption from subsequent tax sales thereof, and, in addition thereto, providing such lot has been legally exempt from taxation for one or more years subsequent to the sale in question, of a sum that would represent the gross amount of taxes and interest that would have been due thereon, providing it had been taxed during each of the years it may have been exempt, on its assessed valuation, and at the rate per cent of taxation thereon for the year when last returned to the comptroller's office. In all cases of tax sales heretofore made by the comptroller, where the land sold was in the actual occupancy of any person at the expiration of the two years allowed for the redemption thereof, and the purchaser or the person claiming under him shall have failed to serve notice of such sale on the occupant or occupants thereof and to file evidence of such service in the comptroller's office, as provided by section sixty-eight of this act, and the occupant or any other person shall fail to file in the comptroller's office within one year after this act shall take effect, a written notice of such occupancy together with an application for the redemption of such lands, and to furnish the comptroller with satisfactory evidence of the occupancy required and make such redemption within two years after this act shall take effect, then, and in all such cases, the said tax sale of such land, and the conveyance thereof by the comptroller, shall become absolute, and the occupant and occupants and all other persons interested in the said lands shall be forever barred from all right and title thereto.

Inconsistent Acts Repealed.

§ 2. All acts and parts of acts inconsistent with this act are hereby repealed.

LAWS 1891, CHAP. 217.

AN ACT to amend chapter four hundred and forty-eight of the laws of eighteen hundred and eighty-five, entitled "An Act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled 'An Act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes.'"

Act Amended.

SECTION 1. Section two of chapter four hundred and forty-eight of the laws of eighteen hundred and eighty-five, entitled "An Act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled 'An Act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes,'" is hereby amended so as to read as follows:

Application of Act.

§ 2. The provisions of this act are hereby made applicable to all the counties in this state, except the counties of Cattaraugus and Chautauqua, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken or application duly made within six months thereafter, for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder. All applications heretofore or hereafter made to the comptroller for the cancellation of any tax sale by any person interested in the event

thereof, shall be heard and determined by him, and his determination shall be subject to review by certiorari, or otherwise. The provisions of this act shall also be applicable to all conveyances made by county treasurers or county judges and to all outstanding certificates from county treasurers' sales.

Proceedings Barred.

§ 2. Nothing herein contained shall be construed to permit a proceeding to be begun or application to be made which is already barred by the provisions of the act hereby amended.

LAWS 1892, CHAP. 463.

AN ACT in relation to the redemption of lands sold at tax sales prior to the year eighteen hundred and ninety.

Time Extended for Action on Application for Redemption.

SECTION 1. In all cases in which a written notice of occupancy, together with an application for the redemption from any tax sale made prior to the year eighteen hundred and ninety, of any lands sold thereat for taxes, was filed in the comptroller's office on or before June seventh, eighteen hundred and ninety-one, in pursuance of the provisions of chapter five hundred and fifty-six of the laws of eighteen hundred and ninety, and proof tending to show the actual occupancy of such lands, as provided by said act, has been filed or may be filed in said office on or before June seventh, eighteen hundred and ninety-two, affidavits and proof in opposition to such application may be presented to the comptroller at any time prior to September first, eighteen hundred and eighty-two, and the time within which the comptroller can take action

on and allow or reject such applications for redemption, and the time within which such redemptions as are allowed by the comptroller can be made, is hereby extended to December first, eighteen hundred and ninety-two.

Inconsistent Acts Repealed.

§ 2. All acts and parts of acts inconsistent with the provisions of this act, are hereby repealed.

LAWS 1892, CHAP. 624.

AN ACT to confirm tax proceedings under chapter two hundred and ninety-eight of the laws of eighteen hundred and fifty.

Tax Sales in Certain Counties Confirmed.

SECTION 1. All tax sales made by the county treasurers of Lewis, Hamilton, Franklin and Herkimer counties, under and in pursuance of chapter two hundred and ninety-eight of the laws of eighteen hundred and fifty, passed April tenth (for the sale of lands in the counties where they were assessed), and all certificates of sale made and delivered by him to any purchaser of any lands at any such sale, and all deeds, executed by such treasurer and the county judge of such county, of any real estate so sold to the purchaser, his heirs or assigns, under and in pursuance of said act, are hereby legalized, confirmed and made valid. Said certificates and deeds respectively shall be received and held in all proceedings as conclusive evidence of a complete title; except that the owner of any real estate so sold, may show that said tax was imposed, and the proceedings to enforce it, were without jurisdiction.

LAWS 1893, CHAP. 398.

AN ACT to further amend chapter four hundred and forty-eight of the laws of eighteen hundred and eighty-five, entitled "An Act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled 'An Act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes.'"

Act Amended.

SECTION 1. Section two of chapter four hundred and forty-eight of the laws of eighteen hundred and eighty-five, entitled "An Act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled 'An act in relation to the collection of taxes on lands of non-residents and to provide for the sale of such lands for unpaid taxes,'" as amended by chapter two hundred and seventeen of the laws of eighteen hundred and ninety-one, is hereby further amended so as to read as follows:

§ 2. The provisions of this act are hereby made applicable to all the counties in this state, except the counties of Cattaraugus and Chautauqua but shall not affect any action, proceeding or application pending at the time of the passage of the act hereby amended, nor any action begun, proceedings taken, or application duly made within six months thereafter, for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

Saving Clause.

§ 2. Nothing contained in this act shall be construed to affect any action or proceeding now pending in any court of record, for the purpose of reviewing any determination of the comptroller of the state of New York.

LAWS 1883, CHAP. 13.

AN ACT to prohibit sales of lands belonging to the state in the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence and Warren.

SECTION 1. Hereafter and from the passage of this act no sales shall be made of lands belonging to the state situated in the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence and Warren.

§ 2. Nothing in this act shall be construed as prohibiting the commissioners of the land office from conveying lands heretofore contracted to be sold, and not yet conveyed, to the purchasers thereof.

LAWS 1885, CHAP. 283.

AN ACT to establish a forest commission, and to define its powers and duties and for the preservation of forests.

SECTION 1. There shall be a forest commission which shall consist of three persons who shall be styled forest commissioners, and who may be removed by the governor for cause. The forest commissioners shall be appointed by the governor by and with the advice and consent of the senate.

§ 2. At the first meeting of the forest commissioners they shall divide themselves by lot, so that the term of one shall expire in two years, one in four years, and one in six years from the first day of February next ensuing. Except as to the three terms of office thus determined, the term of office of a forest commissioner shall be six years from the first day of February on which the preceding term expires.

§ 3. During the month of January, in the year eighteen hundred and eighty-eight, and in every second year thereafter, the governor by and with the advice and consent of the senate shall appoint one forest commissioner. Vacancies that may exist in the office of a forest commissioner after the commencement of a term of office shall be filled by the governor's appointment subject to the confirmation of the senate at its next session for the unexpired portion of the term in which the vacancy occurs.

§ 4. The forest commissioners shall serve without compensation except that there shall be paid them their reasonable expenses incurred in the performance of their official duties.

§ 5. The forest commission shall have power to employ a forest warden, forest inspectors, a clerk and all such agents, as they may deem necessary, and to fix their compensations, but the expenses and salaries of such warden, agents, clerk, inspectors and assistants shall not exceed in the aggregate with the other expenses of the commission the sum therefor appropriated by the legislature.

§ 6. The trustees of public buildings, under chapter three hundred and forty-nine, laws of eighteen hundred and eighty-three, shall provide rooms for office for the forest commission, with proper furniture and fixtures, and with warming and lights.

§ 7. All the lands now owned or which may hereafter be acquired by the state of New York, within the counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, shall constitute and be known as the forest preserve.

§ 8. The lands now or hereafter constituting the forest preserve shall be forever kept as wild forest lands.

They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private.

§ 9. The forest commission shall have the care, custody, control and superintendence of the forest preserve. It shall be the duty of the commission to maintain and protect the forests now on the forest preserve, and to promote as far as practicable the further growth of forests thereon. It shall also have charge of the public interests of the state, with regard to forests and tree planting, and especially with reference to forest fires in every part of the state. It shall have as to all lands now or hereafter included in the forest preserve, but subject to the provisions of this act, all the powers now vested in the commissioners of the land office and in the comptroller as to such of the said lands as are now owned by the state. The forest commission may, from time to time, prescribe rules or regulations and may, from time to time, alter or amend the same, affecting the whole or any part of the forest preserve, and for its use, care and administration; but neither such rules or regulations, nor anything herein contained shall prevent or operate to prevent the free use of any road, stream of water as the same may have been heretofore used or as may be reasonably required in the prosecution of any lawful business.

§ 10. The forest warden, forest inspectors, foresters and other persons acting upon the forest preserve under the written employment of the forest warden or of the forest commission may, without warrant, arrest any person found upon the forest preserve violating any of the provisions of this act; but in case of such arrest, the person making the arrest shall forthwith take the person arrested before the nearest magistrate having jurisdiction to issue warrants in such case, and there make, or procure to be made, a complaint in writing, upon which complaint the magistrate shall act as the case may require.

§ 11. The forest commission may bring in the name, or on behalf of the people of the state of New York, any action to prevent injury to the forest preserve or trespass thereon, to recover damages for such injury or trespass, to recover lands properly forming part of the forest preserve, but occupied or held by persons not entitled thereto, and in all other respects for the protection and maintenance of the forest preserve, which any owner of lands would be entitled to bring. The forest commission may also maintain, in the name or on behalf of the people of the state, an action for the trespass specified in section seventy-four, article fifth, title five, chapter nine, part one of the revised statutes, when such trespass is committed upon any lands within the forest preserve. In such action there shall be recoverable the same penalty, and a like execution shall issue, and the defendant be imprisoned thereunder without being entitled to the liberties of the jail, all as provided in sections seventy-four and seventy-six of the said article; and in such action the plaintiff shall be entitled to an order of arrest before judgment as in the cases mentioned in section five hundred and forty-nine of the code of civil procedure. The trespass herein mentioned shall be deemed to include, in addition to the acts specified in the said section seventy-four, any act of cutting or causing to be cut, or assisting to cut, any tree or timber standing within the forest preserve, or any bark thereon, with intent to remove such tree or timber, or any portion thereof, or bark therefrom, from the said forest preserve. With the consent of the attorney-general and the comptroller, the forest commission may employ attorneys and counsel to prosecute any such action, or to defend any action brought against the commission or any of its members or subordinates arising out of their or his official conduct with relation to the forest preserve. Any attorney or counsel so employed shall act

under the direction of and in the name of the attorney-general. Where such attorney or counsel is not so employed, the attorney-general shall prosecute and defend such actions.

§ 12. In an action brought by or at the instance of the forest commission, an injunction, either preliminary or final, shall, upon application be granted, restraining any act of trespass, waste or destruction upon the forest preserve.

§ 13. Whenever the state owns or shall own an undivided interest with any person in any lands within the counties mentioned in section eight of this act, or is or shall be in possession of any such lands as joint tenant or tenants in common with any person who has an estate of freehold therein, the attorney-general shall, upon the request of the forest commission, bring an action in the name of the people of the state of New York for the actual partition of the said lands according to the respective rights of the parties interested therein; and upon the consent in writing of the forest commission any such person may maintain an action for the actual partition of such lands, according to the respective rights of the parties interested therein, in the same manner as if the state were not entitled to exemption from legal proceedings, service of process in such action upon the attorney-general to be deemed service upon the state. Such actions, the proceedings and the judgment therein, and the proceedings under the judgment therein shall be according to the practice at the time prevailing in actions of partition and shall have the same force and effect as in other actions, except that no costs shall be allowed to the plaintiff in such action, and except that no sale of such lands shall be adjudged therein. The forest commission may, without suit, but upon the consent of the comptroller, agree with any person or persons owning lands within

the said towns jointly or as tenants in common with the state for the partition of such lands, and upon such agreement and consent, the comptroller shall make on behalf of the people of the state any conveyance necessary or proper in such partition, such conveyance to be forthwith recorded as now provided by law as to conveyances made by the commissioners of the land office.

§ 14. All income that may hereafter be derived from state forest lands shall be paid over by the forest commission to the treasury of the state.

§ 15. A strict account shall be kept of all receipts and expenses, which account shall be audited by the comptroller, and a general summary thereof shall be reported annually to the legislature.

§ 16. The forest commission shall, in January of every year, make a written report to the legislature of their proceedings, together with such recommendations of further legislative or official action as they may deem proper.

§ 17. The supervisor of every town in the state in which wild or forest lands belonging to the state are located, except within the counties mentioned in section seven of this act, shall be by virtue of his office the protector of these lands, subject to the instructions he may receive from the forest commission. It shall be his duty to report to the district attorney for prosecution any acts of spoliation or any injury that may be done, and it shall be the duty of such district attorney to institute proceedings for the prevention of further trespass, and for the recovery of all damages that may have been committed, with costs of prosecution. The supervisors shall also report their proceedings therein to the forest commission. In towns where the forest commission shall deem it necessary, they may serve a notice upon the supervisor, requiring him to appoint one or more forest guards, and if more than one in a

town, the district of each shall be properly defined. The guard so appointed shall have such powers, and perform such duties and receive such pay as the forest commission may determine.

§ 18. The forest commission shall take such measures as the department of public instruction, the regents of the university and the forest commission may approve, for awakening an interest in behalf of forestry in public schools, academies and colleges of the state, and of imparting some degree of elementary instruction upon this subject therein.

§ 19. The forest commission shall, as soon as practicable, prepare tracts or circulars of information giving plain and concise advice for the care of woodlands upon private lands, and for the starting of new plantations upon lands that have been denuded, exhausted by cultivation, eroded by torrents, or injured by fire, or that are sandy, marshy, broken, sterile or waste, and unfit for other use. These publications shall be furnished without cost to any citizen of the state, upon application, and proper measures may be taken for bringing them to the notice of persons who would be benefited by this advice.

§ 20. Every supervisor of a town in this state, excepting within the counties mentioned in section seven of this act, shall be ex-officio fire warden therein. But in towns particularly exposed to damages from forest fires, the supervisor may divide the same into two or more districts, bounded as far as may be by roads, streams of water, or dividing ridges of land or lot lines, and he may, in writing, appoint one resident citizen in each district as district fire warden therein. A description of these districts and the names of the district fire wardens thus appointed shall be recorded in the office of the town clerk. The supervisor may also cause a map of the fire district of his town to be posted in some public place with the names of the district fire

wardens appointed. The cost of such map, not exceeding five dollars, may be made a town charge; and the services of the fire wardens shall also be deemed a town charge and shall not exceed the sum of two dollars per day for the time actually employed. Within the counties mentioned in section seven of this act, such persons shall be fire wardens as may from time to time be appointed by the forest commission. The persons so appointed shall act during the pleasure of the forest commission; and there shall be applicable to them all the provisions of this act, with reference to supervisors and district town wardens. Upon the discovery of a forest fire, it shall be the duty of the fire warden of the district, town or county to take such measures as may be necessary for its extinction. For this purpose he shall have authority to call upon any person in the territory in which he acts for assistance, and any person shall be liable to a fine of not less than five nor more than twenty dollars for refusing to act when so called upon.

§ 21. The forest commission, the forest warden, the forest inspector, the foresters, and any other person employed by or under authority of the forest commission, and who may be authorized by the commission to assume such duty, shall within the counties mentioned in section seven of this act, whenever the woods in any such town shall be on fire, perform the duty imposed upon, and in such case shall have the powers granted to the justices of peace, the supervisors and the commissioner of highways of such town by title fourteen of chapter twenty of part one of the revised statutes, with reference to the ordering of persons to assist in extinguishing fires or stopping their progress; and any person so ordered by the forest commission, the forest warden, the forest inspectors, the foresters, or any of them, or any other person acting or authorized as aforesaid who shall refuse or neglect to comply with any

such order, shall be liable to the punishment prescribed by the said title.

§ 22. No action for trespass shall be brought by any owner of land for entry made upon his premises by persons going to assist in extinguishing a forest fire, although it may not be upon his land.

§ 23. The fire wardens, or the supervisor, where acting in general charge, may cause fences to be destroyed or furrows to be plowed to check running fires, and in cases of great danger, back-fires may be set along a road or stream or other line of defense, to clear off the combustible material before an advancing fire.

§ 24. The supervisor of every town of which he is a fire warden, as aforesaid, and in which a forest fire of more than one acre in extent has occurred within a year, shall report to the forest commission the extent of the area burned over, to the best of his information, together with the probable amount of property destroyed, specifying the value of timber, as near as may be, and amount of cord wood, logs, bark or other forest product, and of fencing, bridges and buildings that have been burned. He shall also make enquiries and report as to the causes of these fires, if they can be ascertained, and as to the measures employed and found most effectual in checking their progress. A consolidated summary of these returns by counties and of the information as to the same matter otherwise gathered by the forest commission shall be included in the annual report of the forest commission.

§ 25. Every railroad company whose road passes through waste or forest lands, or lands liable to be overrun by fires within this state, shall twice in each year cut and burn off or remove from its right of way all grass, brush or other inflammable material, but

under proper care, and at times when the fires thus set are not liable to spread beyond control.

§ 26. All locomotives which shall be run through forest lands shall be provided, within one year from the date of this act, with approved and sufficient arrangements for preventing the escape of fire from their furnace or ashpan, and netting of steel or iron upon their smoke-stack to check the escape of sparks of fire. It shall be the duty of every engineer and fireman employed upon a locomotive to see that the appliances for the prevention of the escape of fire are in use and applied, as far as it can be reasonably and possibly done.

§ 27. No railroad company shall permit its employees to deposit fire coals or ashes upon their track in the immediate vicinity of woodlands or lands liable to be overrun by fires, and in all cases where any engineers, conductors or trainmen discover that fences along the right-of-way, on woodlands adjacent to the roads are burning, or in danger from fire, it shall be their duty to report the same at their next stopping place, and the person in charge of such station shall take prompt measures for extinguishing such fires.

§ 28. In seasons of drought, and especially during the first dry time in the spring and after the snows have gone and before vegetation has revived, railroad companies shall employ a sufficient additional number of trackmen for the proper extinguishment of fires. And where a forest fire is raging near the line of their road they shall concentrate such help and adopt such measures as shall most effectually arrest their progress.

§ 29. Any railroad company violating the provisions or requirement of this act shall be liable to a fine of one hundred dollars for each offense.

§ 30. The forest commission shall, with as little delay as practicable, cause rules for the prevention and suppression of forest fires to be printed for posting in school-houses, inns, saw-mills, and other wood-working establishments, lumber camps and other places, in such portions of the state as they may deem necessary. Any person maliciously or wantonly defacing or destroying such notices shall be liable to a fine of five dollars. It shall be the duty of forest agents, supervisors and school trustees to cause these rules, when received by them, to be properly posted, and replaced when lost or destroyed.

§ 31. Any person who shall willfully or negligently set fire to, or assist another to set fire to, any waste or forest lands belonging to the state or to another person, whereby the said forests are injured or endangered, or who suffers any fire upon his own land to escape or extend beyond the limits thereof, to the injury of the woodlands of another or of the state, shall be liable to a fine of not less than fifty dollars nor more than five hundred dollars, or to imprisonment of not less thirty days nor more than six months. He shall also be liable in an action for all damages that may be caused by such fires; such action to be brought in any court of this state having jurisdiction thereof.

§ 32. Fifteen thousand dollars is hereby appropriated out of any moneys in the treasury not otherwise appropriated, for the purposes of this act. And no liabilities shall be incurred by said forest commissioners in excess of this appropriation.

§ 33. This act shall take effect immediately.

LAWS OF 1893, CHAPTER 711.

AN ACT in relation to the sale and redemption of lands sold for taxes.

(Approved by the Governor May 16, 1893. Passed, three-fifths being present.)

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * * * * * *

§ 12. EFFECT OF FORMER DEEDS.—Every such conveyance heretofore executed by the comptroller, county treasurer or county judge, and all conveyances of the same lands by his grantee or grantees therein named, which have for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller, that shall have remained in force for two years after the last day allowed by law for redemption from such sale, shall be conclusive evidence that the sale and proceedings prior thereto, from and including the assessment of the lands, and all notices required by law to be given previous to the expiration of the time allowed for redemption, were regular and were regularly given, published and served, according to the provisions of all laws directing and requiring the same or in any manner relating thereto, but all such conveyances and certificates, and the taxes and tax values on which they are based, shall be subject to cancellation, on direct application to the comptroller, or in an action brought before a competent court therefor by reason of the payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid, or by reason of any defect in the proceedings affecting the jurisdiction upon constitutional grounds.

Sec. 13. POSSESSION OF LANDS BY THE STATE.—The comptroller may advertise once a week for at least three weeks successively, a list of the wild, vacant and

forest lands to which the state holds title, from a tax sale or otherwise, in one or more newspapers to be selected by him, published in the county in which the lands are situated, and from and after the expiration of such time, all such wild, vacant and forest lands are hereby declared to be and shall be deemed to be in the actual possession of the comptroller, and such possession shall be deemed to continue until he has been dispossessed by the judgment of a court of competent jurisdiction.

* * * * * * * * *

Sec. 39. Laws Repealed.—Of the laws enumerated in the schedule hereto annexed that portion specified in the last column is repealed.

Sec. 40. When to take Effect.—This chapter shall take effect on May first, eighteen hundred and ninety-three.

Schedule of Laws Repealed.

Laws of.	Chapter.	Sections.
1855.....	427.....	33-39, 42-62, 65, 68-93.
1860.....	209.....	All.
1862.....	285.....	1.
1870.....	280.....	All.
1873.....	120.....	All.
1875.....	572	1, 2, 3.
1878.....	152.....	Part amending sections 33, 34, 37, 38, 41, 48 and 86 of Laws 1855, chapter 427.
1881.....	402.....	1, 2, 3, 4.
1885.....	453.....	3, 4.
1890.....	206.....	All.
1890.....	556.....	All.
1892.....	266.....	All.
1892	347.....	All.

§ 1502. AGAINST WHOM ACTION TO BE BROUGHT.

Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein at the time of the commencement of the action.

§ 1503. WHO MAY BE JOINED AS DEFENDANTS.

In either of the cases specified in the last section, any other person claiming title to, or the right to the possession of, the real property sought to be recovered, as landlord, remainderman, reversioner, or otherwise adversely to the plaintiff, may be joined as defendant in action therefor.

THE MARTIN B. BROWN COMPANY, Printers, 49 to 57 Park Place, N. Y.

No. 94.
Reply Brf. of Smith & Conway,

Office Supreme Court U. S.
DEC 6 1899
JAMES H. McKENNEY,
Clerk.

Filed Dec. 6, 1899.

Supreme Court of the United States.

THE SARANAC LAND AND TIMBER COMPANY, Plaintiff in Error, *against* JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant in Error.	No. 94. October Term, 1899.

Brief for Plaintiff in Error in Reply.

I.

Constitutionality.

The learned counsel for defendant first insist that the constitutionality of the Short limitation law, chapter 448 of the Laws of 1885, is not an open question because of the decision of this Court in *Turner* vs. *The People*. They, then, in their third point, endeavor to meet the arguments against the validity of that law by pointing out the remedies which they conceive to have existed in favor of the land-owner as against the State, while the six months allowed by the new law was running.

The existence and efficiency of these alleged remedies must be considered with reference to the situation as it was when the new limitation statute went into operation in June, 1885. That situation was that in 1877 the land in controversy had been *illegally* sold to the State for unpaid taxes and conveyed to the State by the Comptroller in 1881. No one—neither the State nor the owner—was in *actual* possession, the land being wild, vacant forest land. This sale, as shown in our principal brief, did not affect either the title or the constructive possession of the true owner (Brief, p. 21, and 42–50). This being the situation, the State, in 1885, enacted the Short limitation law now in question, and seeks by its aid to make the sale of 1877 and the Comptroller's deed in pursuance of it, both of which were void when made, effectual to transfer title to the State.

The argument of our adversaries concedes that unless *at that time* the land-owner could in some way have effectually asserted his right to the land, as against the State, the new limitation law cannot be sustained.

Four remedies are pointed out, any or all of which it is, impliedly at least, asserted the land-owner might have invoked against the State (Deft.'s Brief, p. 26).

First—*An appeal to the Board of Supervisors.*

It is not easy to see, and the learned counsel for defendant do not point out, how the Supervisors can interfere with sales of land for taxes. They may, to a certain extent, revise and correct assessments, but they have nothing to do with subsequent proceedings.

Second—*A direct action against the Comptroller to vacate the tax deed* (Deft.'s Brief, p. 27).

It is manifest that such an action would be, in effect, an action against the State and could only be maintained if authorized by the Legislature.

It is argued that the new limitation law itself authorized such an action. The words of the statute on which reliance seems to be placed are: "But all such convey-

"ances and certificates, and the taxes and tax sales on "which they are based, shall be subject to cancellation "as now provided by law on a direct application to the "Comptroller, or an action brought before a competent "court therefor."

It is conceded that the direct application to the Comptroller, "as now provided by law," could not have been made. There was no law which so "provided," so far as the land-owner was concerned. An action necessarily presupposes some one to be sued. The statute evidently contemplates an ordinary suit between the land-owner and the tax purchaser, in accordance with existing laws. It does not purport to give any new remedy.

People *ex rel.* Wright *vs.* Chapin (1887), 104 N. Y., 369, 376.

But whether it be construed as creating a new remedy or recognizing the existence of an old, yet as it is a general law and does not name or refer to the State, it does not authorize an action against the State or against the Comptroller as its representative.

People *vs.* Dennison (1881), 84 N. Y., 272, 282.

Savings Bank *vs.* U. S. (1873), 19 Wall., 227, 239.

In *Savings Bank* vs. *United States*, 19 Wall, 227, STRONG, *J.*, says (p. 239): "It is a familiar principle "that the King is not bound by any act of Parliament, "unless he be named therein by special and particular "words."

THIRD—*An action against the Forest Commission* (Deft.'s Brief, p. 27).

The argument upon this point was anticipated and answered in our principal brief, pp. 27 to 39. See also *Meigs* vs. *Roberts*, *infra*, p. 21.

FOURTH—*A suit to remove a cloud from the title* (Deft.'s Brief, p. 31).

The learned counsel for defendant says, with reference to this alleged remedy:

> "As to all cases where the certificate had been
> "issued for four years or the conveyance recorded
> "for two, at the time the law went into effect, an ac-
> "tion could have been commenced at once to vacate
> "the certificate or deed as a cloud upon the title."

Against whom could such a suit have been brought in a case where the State was the party claiming title under the deed to be attacked? Manifestly the proper party defendant would be the State itself.

Cunningham *vs.* Macon & Brunswick R. R. (1883), 109 U. S., 446.

Counsel do not point out any statute by which the State has consented to be so sued.

As to a suit against the Comptroller to *prevent* a cloud on title, the time had long passed.

We, therefore, respectfully insist that every one of the remedies alleged to have existed in favor of the land-owner, when the new law went into effect, were wholly illusory; that there was no way in which it was possible for the land-owner to have asserted his title as against the State and that the six months' grace tendered him by the statute was but a mockery.

II.

Jurisdictional Defects.

Counsel for defendant insist that the defects alleged in the tax sale of 1877 are not jurisdictional in their nature, but irregularities merely, which are within the scope of the limitation law. The argument upon this point is merely a long quotation from the prevailing opinion in *Marsh* vs. *Ne-ha-sa-ne Park Association*, 25 App. Div., 34. As pointed out in our principal brief, this case cannot be

considered as *settling* the law of New York. It had not been rendered when this action was begun or when it was tried. It is only the judgment of a divided intermediate Court—reversing the trial Court—and is liable to be wholly overthrown by the Court of Appeals. It is not consistent with the later decision of the same court in *Meigs* vs. *Roberts, as Comptroller* (1899), 42 App. Div., 290.

[This case is not yet reported, except in advance sheets. We, therefore, print it in full as part of this brief, see p. 16, *infra.*]

Under these circumstances we submit that it is not conclusive upon this Court, when reviewing a judgment of the Circuit Court.

> Burgess *vs.* Seligman, 107 U. S. (1882), 20, 33.

It is only when a construction of a statute has been adopted by the *highest* Court of the State, or perhaps has been long acquiesced in, that it becomes a "rule of decision" binding on this Court.

> Beecher *vs.* Cheshire R. R. Co. (1887), 125 U. S., 555, 582.
>
> Wade *vs.* Travis County (1898) 174 U. S., 499, 508.

It may be that this Court will hold that the sale of land to pay taxes which it does not owe and is not liable to pay, is merely an irregularity in procedure, but such is not yet the *settled* law of New York.

Counsel for defendant seek to do away with the defect growing out of the uncertain description of the land assessed by claiming that plaintiff waived it by conceding that there was no question of fact for the jury (Defendant's brief, p. 23).

The point of our attack upon the description was that it was impossible to locate the exception of 1215 acres of water because upon the proofs there was either more or less than that area of water within the tract described. Plaintiff gave evidence to show that the true area of those

portions of the Saranac Lakes within the tract was 1,035 acres, that there was not, and for more than thirty years past, had not been any other body of water upon the tract. Defendant met this evidence by proving that during 1866 to 1870 there was a dam across the outlet of the lake which, when closed, raised the level so that the area of land covered by water was on an average about 200 to 250 acres greater than at the time of the trial (Record, p. 23).

We do not see that any question of fact was made by this evidence. Defendant accepted the present area of the lakes as claimed by plaintiff, and plaintiff did not dispute the former existence of the dam. This left the undisputed testimony to the effect that the natural area of the lake was 1,035 acres; the unnatural area—that is the area when the dam was closed—from 1,235 to 1,285 acres. Neither party claimed on the trial that the true area was 1,215 acres.

We submit that the undisputed evidence was such as to entitle the plaintiff to a ruling upon the fifth proposition of law tendered to the Court (Record, p. 24), and that the correctness of the ruling of the trial Judge is properly here for review.

Counsel for defendant practically admits that the seventh proposition of law which plaintiff requested the Court to affirm was correct, and that the seventh assignment of error is well taken. The proposition was in effect that the State got no title by the compulsory bidding in at the 1881 sale—a sale at which no person but the State was allowed to bid.

This is a jurisdictional defect. It has been twice so held by the Appellate Division of the New York Supreme Court, the last case being *Meigs* vs. *Roberts* hereto annexed. Such bidding in is a mere assertion of existing ownership. Counsel seek to avoid the effect of this error by claiming that the 1877 sale was valid, and therefore the assertion of ownership made by the Comptroller by bidding in at the

subsequent sales was true. But we submit that plaintiff is entitled to the benefit of the rule that when there are several issues tried and decided by a general verdict the defendant party is entitled to a new trial if the jury has been misdirected as to any one of them.

Maryland *vs.* Baldwin (1884), 112 U. S., 490.

This action being one properly triable by a jury and having been tried by the Court without a jury, pursuant to section 649 of the Revised Statutes (Record, p. 11), and the Court having made a general finding in favor of defendant (Record, p. 25), such finding is equivalent to a general verdict of a jury and is to be reviewed in a similar way.

Norris *vs.* Jackson (1869), 9 Wall., 125.

In the present case, the answer set up the 1881 tax sale as a separate and distinct defense, and asserted it to be valid and sufficient to convey the land in fee simple to the State (Record, p. 6). The trial Court having clearly erred in regard to the law applicable to this sale, and that error being presented by an appropriate exception, we are entitled to a new trial, for it may very well be that it was the assumed validity of this sale which controlled the Court and induced it to find for the defendant.

III.

Champerty.

It is urged that plaintiff's title is void for champerty. We submit that no such question arises on the present record. It is true that the answer sets up such defense, but it was not passed upon by the trial Court. No ruling was made in regard to it, and, of course, no exception taken which presents any question as to it. The judgment entered, not only dismisses the complaint, but establishes

affirmatively the title of the State (Record, p. 13). The defendant has been successful solely by reason of the tax sale to the State, the validity of which is, of course, the real question. The bill of exceptions contains only a small part of the evidence given on the trial; so much only as was pertinent to the questions raised by the exceptions. If any of these exceptions are valid and such as to entitle plaintiff to a new trial, it ought not to be deprived of it on the ground of champerty. It cannot be said that such defense is so clearly made out that a new trial would be useless.

But there is no just ground for alleging champerty in the deeds to plaintiff.

The champerty statute is to be strictly construed. Says *Seldon, J.*, in *Crary* vs. *Goodman*, 22 N. Y., 177: "It is "the relic of an ancient policy which has been treated with "but little favor by either Legislature or courts in modern "times."

It applies only to lands in *actual* possession.

Dawley *vs.* Brown (1880), 79 N. Y., 390.

Such possession must be under a specific paper title.

Crary *vs.* Goodman (1860), 22 N. Y., 170.

In the present case, the defendant asserted the land to be wild, vacant, forest land and took possession of it as such in January, 1895 (Record, pp. 16–17). The record alleges that no proof of actual posession by plaintiff or its grantors was given, but none was needed. Such lands are always deemed to be in the possession of the true owner.

Bliss *vs.* Johnson (1883), 94 N. Y., 235.

U. S. *vs.* Arredondo (1832), 6 Pet., 691, 743.

Had the deeds to plaintiff been made *after* the Comptroller published the notice, which the statute declares shall clothe him with actual possession, there might have been some color to the claim, but the title of plaintiff was perfected in December, 1894. The Comptroller did

not acquire possession till January, 1895 (Record, p. 17). It is urged that the Forest Commission had actual possession. The position of the learned counsel for defendant is not consistent as to this Commission. For some purpose they treat it as the State, and for other purposes, as an entity distinct from the State. To save the constitutionality of the limitation law they argue that the Commission might have been sued in ejectment, which is possible only by assuming that it is *not* the State. To defeat the title of the plaintiff on the ground of champerty, it is necessary for them to assert that it is the State, for treating it as a separate entity and assuming it to have been in actual possession, yet as it does not claim to have any paper title, the doctrine of *Crary* vs. *Goodman*, 22 N. Y., 170, defeats the claim of champerty.

It must, of course, be plain that the Forest Commission is the State as regards all forest lands, and it must be equally plain that as to such lands there is no *actual* possession. The champerty statute has, therefore, no application. It was so held in the recent case of *Meigs* vs. *Roberts, as Comptroller* (*infra*, p. 16).

So far as section 130 of the Penal Code is concerned, it has no application, inasmuch as plaintiff claimed under a grant from the State itself (Record, p. 16).

Wright *vs.* Syracuse, Ontario & W. R. R. (1895), 92 Hun, 32.

The reason for the law against champerty has no application with regard to land which, if held adversely at all, is so held by the State. That reason was that under cover of such deeds "pretended titles might be granted to great "men whereby right might be trodden down and the "weak oppressed" (Coke Litt., 214*a*; see also opinion of Kent, *C. J.*, in *Jackson* vs. *Hudson* (1808), 3 John., 375).

The rights of the State of New York are in no danger of being "trodden down"; neither is it so weak as to be liable to oppression at the hands of this New Jersey corporation. *Cessante ratione legis cessat ipsa lex.*

IV.

Jurisdiction of the Circuit Court.

The defendant challenges the jurisdiction of the Circuit Court on the ground that the suit does not involve a controversy properly within its jurisdiction and that plaintiff has been made a party collusively and the attempt is made to bring the case within the recent ruling of this Court in *Lehigh Mining and Manufacturing Co.* vs. *Kelly,* 160 U. S., 327.

We submit that such question does not properly arise on this record.

1. Defendant has obtained judgment not only dismissing the complaint, but establishing affirmatively the title of the State to the land. The defendant now asks by his brief that this judgment be affirmed and yet in the same breath he seeks to impeach the jurisdiction of the Court which has rendered judgment in his favor.

2. The cause is here for review, on a strict bill of exceptions and contains only the evidence material to the exceptions taken by the defeated party. The plaintiff, having invoked the jurisdiction, of course does not assail it, and defendant having taken an affirmative judgment in his favor cannot.

3. The objection now urged against the jurisdiction by the Circuit Court ought to have been raised by plea to the jurisdiction and before a trial on the merits.

Deputron *vs.* Young (1890), 134 U. S., 241.

Had defendant filed such plea to the jurisdiction, as was done in *Lehigh Co.* vs. *Kelly,* and being defeated thereon, brought that question with *all the evidence necessary for its proper determination* here for review, a different question would be presented. Having tried the case on the merits, and having been successful, he ought not now to be heard to question the right of the Court to give judgment in his favor.

4. The bill of exceptions was not prepared for the purpose of reviewing any such question. We understand the rule to be that a bill of exceptions cannot be used to bring up all the evidence in the case and should contain only so much of the evidence as is pertinent to the exceptions taken by the defendant party.

Johnston *vs.* Jones (1861), 1 Black, 209.
Lincoln *vs.* Claflin (1868), 7 Wall., 132.
Lewis *vs.* United States (1892), 146 U. S., 370. Opinion of Brewer, *J.*, 383, 384.

The bill of exceptions in this case was prepared in attempted compliance with this rule, and as originally proposed, contained no reference to the facts on which the *successful party* now seeks to impeach his own judgment. But on settlement of the bill the defendant forced into it certain statements as to the facts proved on the trial relating to the unsuccessful attack on the jurisdiction. This statement is very partial and incomplete and omits entirely many important matters proved on the trial, as, for instance, that the creation of a corporation and the transfer to it of the land in dispute was determined on by the parties interested long before it was in fact done, and at a time when it was not possible to bring this or any other action to try the title of the State; that the principal reasons which induced the transfer to the corporation were the ordinary business reasons which usually control in such cases, namely, continuity of ownership free from the embarrassments which result from death, bankruptcy, etc.; convenience of management and full control by the majority in interest; that immediately on the organization of plaintiff a considerable part of its stock was transferred for value to persons who never had any interest in the land as such. The trial Court having entertained jurisdiction, this Court ought not to interfere with its action upon what is really a question of fact without having all the evidence bearing on that fact before it.

Barry *vs.* Edmunds (1886), 116 U. S., 550.
Deputron *vs.* Young (1890), 134 U. S., 241.

(5) The diverse citizenship necessary to confer jurisdiction on the Circuit Court was alleged in the complaint and not denied by the answer, under section 1776 of the New York Code of Civil Procedure, which is as follows:

> "Sec. 1776. In an action brought by or against a corporation the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff or defendant, as the case may be, is not a corporation."

The jurisdiction of the Circuit Court was, therefore, admitted on the record.

> Deputron *vs.* Young (1890), 134 U. S., 241.

(6) The facts appearing on this record do not bring the case within the decision in *Lehigh Mining and Manufacturing Co.* vs. *Kelly*, 160 U. S., 327.

In that case the plaintiff virtually stipulated itself out of court by its agreed statement of facts, one of which was that *the* purpose for which the plaintiff company was organized and the land conveyed to it was to give the Court jurisdiction of that very case; so, also, it was admitted that the stockholders of the new corporation were the same as the stockholders of the corporation which conveyed the land to the plaintiff. In the present case nothing appears as to the motive of the grantors of plaintiff or of the plaintiff itself, except the statement in the bill of exceptions that defendant gave evidence tending to prove that "*one* of the purposes of said corporation was the bringing of this suit in the United States Circuit Court" (Record, p. 20). As to the identity of the stockholders of the new corporation with the former owners, while it appears that such owners became stockholders and took stock in payment for the land conveyed, yet it also appears that the whole stock was not so issued to them, but that two other persons then came in to whom two shares of the stock were issued apparently for cash; and if the

whole evidence were here it would appear that immediately on the organization of the plaintiff one-quarter of its stock was conveyed for value to persons who never had any interest in the land. The brief of defendant virtually admits this (see pp. 42 and 43).

Counsel for defendant seek to get rid of the two shares of stock issued for cash by invoking the maxim *de minimis*. We do not know within what limits this maxim has force. It appears, however, by the present record that if plaintiff establish its title to the lands in controversy the two shares so issued will be worth upwards of $3,200. This results from defendant's own valuation of the property—" upwards of $200,000 " (Record, p. 29; marginal, p. 58), that property being now represented by 122 shares of stock.

The right of a grantee of land to sue for its recovery in a Federal Court, although his grantor could not have done so, is indisputable. The only qualification attached to that rule by this Court in *Lehigh Co.* vs. *Kelly* is that the conveyance of the property must be " a real transac- " tion by which the title passed without the grantor or " vendor reserving *or having* any right or *power* to compel " or require a reconveyance or return to him of the prop- " erty in question " (160 U. S., 336).

If the conveyance be a real one, the motive which induced it is immaterial.

Crawford *vs.* Neal (1892), 144 U. S., 585.

In *Lehigh Co.* vs. *Kelly* the Court declared its intention to adhere to this doctrine (160 U. S., 336).

In the present case, even under the partial statement of the bill of exceptions, the original grantors of plaintiff's cannot, after the land shall have been recovered, *compel* the corporation to reconvey to them *without consideration* all or any part of the corporate property. Such a reconveyance would be in fraud of the right of the other stockholders, even though the stock so held be only two shares; *a fortiori*, is this true on the admission of defendant's brief that still other persons have become owners of

stock of the plaintiff. We submit that the case of *Lehigh Co.* vs. *Kelly* is an authority in support of the jurisdiction, as was held in the case of *Irving Co.* vs. *Bond,* 74 Fed. Rep., 849, a case substantially like the present as regards the question of jurisdiction.

V.

Failure of former owners to pay taxes.

It is urged that the former owners of these lands have paid no taxes since 1852, and that if the sales are not sustained, the arrears, with interest, will amount to $30,000.

The statement of defendant's counsel is broader than the record warrants; but passing that, we do not see that it is any answer to say to a land-owner seeking to defend himself against unlawful taxation that he has not paid the tax.

Another answer to the argument is that as regards any *legal* taxes which went into the illegal *sales,* the lien is not lost, and the State can resell the land according to law if such taxes are not paid. More than this, by chapter 435 of the Laws of 1885, section 22 (Appendix, p. 84, 85), the Comptroller is authorized to relevy any and all taxes found either before or after sale to be illegal or void by reason of any irregularity in the proceedings, and such relevy is made conclusive evidence of its validity, leaving the tax, of course, subject to payment or the land liable to sale for a *valid tax* if it be not paid. The only restriction upon this power to relevy is that the tax should have been based upon a valid assessment.

People *ex rel.* Barnard *vs.* Wemple, 117 N. Y., 77.

The plaintiff if successful in recovering the land will have to play all legal taxes, and all taxes having sufficient

foundation to be legally relevied, together with 10 per cent. interest.

As to taxes which never had any legal foundation whatever,we submit that neither law nor equity requires anything from this plaintiff.

In this way all the just rights of the State will be protected, even if it does lose a tract of valuable land. Tax laws were never intended as a substitute for proceedings under the right of eminent domain or as a means of acquiring land for public use. Says BLACK, on Tax Titles, section 301:

> "Land which is acquired by a public corporation in this manner (*i. e.*, by tax sale), is not regarded in quite the same way as the general public property. This is for two reasons: In the first place, such land is not bought for speculative purposes or for corporate uses, but as a means of enforcing the collection of taxes. In the second place, it is not generally intended that it should be held by the State or municipality indefinitely, but only until some person is found who will take the land and pay the taxes and accrued charges."

VI.

The judgment should be reversed and a new trial ordered.

December, 1899.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Plaintiff in Error.

N. Y. SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

FERRIS J. MEIGS,
Appellant,

against

JAMES A. ROBERTS, as Comptroller of the State of New York,
Respondent.

42 App. Div., 290,
Advance Sheets
September, 1899.

State tax sales—a bidder's certificate for a portion of a tract, transferred to the State because of his default in payment—the State does not obtain title thereunder to the entire tract—a subsequent purchase at a tax sale by the State, based on the prior sale, is ineffectual—right to maintain an action in ejectment against the Comptroller—purchase of land the subject of controversy—sale of a pretended title.

Section 4 of chapter 453 of the Laws of 1885 (re-enacted in section 13 of chapter 711 of the Laws of 1893) which amended the General Tax Law (Chap. 427, Laws of 1855), by adding thereto section 93, providing as follows: "From and after the advertisement, once a week for three successive weeks, of a list of wild, vacant or forest lands, to which the State holds title from a tax sale or otherwise, in one or more newspapers to be selected by the Comptroller, published in the county in which such lands may be located, all of such wild, vacant or forest lands shall be deemed, and are hereby declared to be, in the actual possession of the Comptroller of this State; and such possession shall be deemed to continue until he has been dispossessed by the judgment of a competent tribunal," was designed to enable a person claiming title to land conveyed to the State of New York under a tax deed from the Comptroller, to attack the validity of the State's title in an action of ejectment brought against the Comptroller, although such lands may be within the Forest Preserve.

Where a specific portion of a lot offered for sale at a Comptroller's tax sale is bid off in 1881 for the amount assessed against the entire tract, and after the notice of redemption has been given the bidder's certificate is transferred, for a default of the purchaser in the payment of his bid, to the State under

section 48 of chapter 427 of the Laws of 1855, as amended by chapter 152 of the Laws of 1878 and by chapter 402 of the Laws of 1881, which provides that in such a case the State shall be deemed to have purchased the entire plot liable to be sold, for the purchase money mentioned in the certificate, the State does not acquire title thereto.

The defect in the State's title is jurisdictional, and is not cured by chapter 448 of the Laws of 1885, which provides that conveyances executed by the Comptroller shall, after having been recorded for two years in the office of the clerk of the county in which the land is situated, be conclusive evidence that the sale and all proceedings prior thereto were regular.

The purchase by the State of the lands at a subsequent tax sale at which no competition was allowed, as provided in section 5 of chapter 402 of the Laws of 1881, amending section 66 of the Tax Law of 1855, is a mere assertion of ownership under the previous conveyance and confers no additional title on the State.

A deed executed while the grantors are prosecuting a proceeding before the Comptroller to vacate a tax sale of the premises to the State, is not within the condemnation of section 129 of the Penal Code, making it a crime to accept a conveyance of lands which are the subject of controversy by suit in any court.

Such a deed cannot be treated as a sale of a pretended title within the meaning of section 130 of that Code.

Appeal by the plaintiff, Ferris J. Meigs, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the Clerk of the County of Franklin on the 22d day of October, 1898, *upon the decision of the Court rendered after a trial at the St. Lawrence Special Term dismissing the complaint.*

John P. Badger, for the appellant; J. C. Davies, Attorney-General, and Theodore E. Hancock, for the respondent.

Parker, *P. J.*—The action is ejectment to recover from the defendant the possession of about 585⅜ acres of land. Such land is wild and uncultivated, situated in Franklin County, within the limits of the Forest Preserve, and it is claimed that the defendant, as Comptroller of the State, is in the actual possession thereof, and that this action may be maintained against him by reason of the provisions of section 13 of chapter 711, Laws of 1893. The Comptroller had, under the provisions of that section, ad-

vertised such lands as lands to which the State holds title; and this action is evidently brought to determine the validity of such claim. The trial Judge, after taking all the evidence offered by both sides upon the issues presented, dismissed the complaint upon the ground that the action was one against the State, and, therefore, could not be maintained. And from the judgment entered on such decision this appeal is taken.

The provisions of the above section were first enacted in section 4 of chapter 453 of the Laws of 1885, amending chapter 427 of the Laws of 1855. The phraseology of that section, which is not substantially changed by the one above cited, was as follows:

"Sec. 93. From and after the advertisement, once a week for three successive weeks, of a list of wild, vacant or forest lands, to which the state holds title from a tax sale or otherwise, in one or more newspapers to be selected by the comptroller, published in the county in which such lands may be located, all of such wild, vacant or forest lands shall be deemed, and are hereby declared to be, in the actual possession of the comptroller of this state; and such possession shall be deemed to continue until he has been dispossessed by the judgment of a competent tribunal."

At that session of the Legislature two other acts were passed which have some bearing upon the question here presented. One, the act creating the Forest Commission, being chapter 283, Laws of 1885; and the other being chapter 448 of such laws, which amends section 65 of the general act regulating the collection of taxes, to wit, chapter 427 of the Laws of 1855. The owners of lands which had been previously sold for taxes in this large tract of wilderness were in many instances claiming that the taxation and proceedings thereunder had been irregular and without authority, and that the conveyances which the State had given under such proceedings were, therefore, void, and frequent applications had been made by the owners to the Comptroller to vacate such sales and

the conveyances given thereon. The courts had held that such a remedy was not open to the owner, and that he must establish his title as against the one given upon the tax sale by his action of ejectment in the courts of the State (*People* ex rel. *Wright* vs. *Chapin,* 104 N. Y., 369; *People* ex rel. *Millard* vs. *Roberts,* 151 Id., 540).

With the view, evidently, to check the litigation which was increasing under such claims, the 65th section of the General Tax Law was amended by the act above cited so as to substantially provide that all the conveyances previously executed by the Comptroller, which up to that time had been presumptive evidence only, should, six months after such act took effect, and after having been recorded for two years in the office of the clerk of the county wherein the lands were situated, be *conclusive* evidence "that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto." And the conveyances thereafter executed or previously executed, but thereafter recorded, were thereby made conclusive evidence of the regularity of such proceedings and matters from and after the expiration of two years from the date of its record. The provisions of this act which gave to the owner six months' time in which to attack the validity of the proceedings under which the conveyances theretofore recorded for two years were issued, and which limited all owners in subsequent cases to the two years after the recording of such conveyances in which to attack their validity, were evidently incomplete and unjust, if there were no provision by which the owner might bring before some judicial tribunal the question of its validity in those cases where the State itself was the purchaser or the grantee. It was household law that, unless specially authorized by statute, no action could be maintained

against the State in its own courts to test the title which it claimed under such a conveyance, and the courts had determined that the owner had no standing before the Comptroller to procure a vacation by him of the sale and conveyance. Hence, the owner was without remedy, unless perchance he could provoke the State to test the issue in some proceeding instituted by it against himself.

Such was the situation under which the section first above quoted was enacted. It was passed upon the same day that the statute last-above cited was passed and took effect at the same time. And it is also an amendment of the General Tax Law of 1855 by adding section 93 thereto. Clearly, it seems to me, that the purpose of such section 93 was to supplement and give fair effect to the amendment of section 65, and to make the way clear for the owner to assert and enforce his rights as against the title which the State claimed in any conveyance issued to it by the Comptroller. The easiest and usual way to procure an adjudication as to the ownership of lands was to bring an action of ejectment against the party who was in possession claiming the same. As to those lands which the State claimed under a conveyance made upon a sale for taxes, it was deemed just to at once take possession and permit an action of ejectment to be brought to test such claim. Particularly was it just after the amendment of section 65, above cited. Hence, the passage of section 93, the plain intent and meaning of which, it seems to me, was to assume, on behalf of the State, the actual possession of all such lands in the name of the Comptroller and to permit an action to be maintained to dispossess him of such possession, and thus test the title of the State to the same. If such was not the purpose and meaning of the section, I cannot see that it has any force or effect whatever.

In *People ex rel. Millard* vs. *Roberts* (151 N. Y., 540, 542) this plaintiff's grantors had made application to vacate the tax sale of 1885 of the very lands in question here

on the grounds of irregularity in the tax, and claimed that because the *State* had become the purchaser and grantee, such a proceeding might be maintained. But the Court of Appeals, affirming the judgment of this court (8 App. Div. 219), held that the same rule was applicable when the State was the grantee, as had long been applied when the conveyance was to third parties; that the remedy of the owner was not before the Comptroller, but by action in the courts. It was said in that case (p. 543): "If the sale is invalid his title is not affected, and he may keep and defend his possession, or, if put out of possession, he may regain it by action of ejectment." In that case the court was speaking of the very lands in question here, and of a sale thereof under which the defendant in this action seeks to justify his possession and sustain the title of the State. It seems very clear that the advertisement by the Comptroller, under the above-cited 96th section, operated to put the *actual* possession of the lands in the Comptroller, and thus not only to deprive the owners of it, but also to prevent their ever actually acquiring it. And I know of no authority under which an action could be brought to regain it other than the section in question. It would seem that such decision is substantially an authority to that effect.

It is claimed that the Forest Commission has the possession of all lands within the limits of the Forest Preserve, and that, if it could be maintained at all, this action should be brought against it. By section 1 of chapter 283 of the Laws of 1885, the "care, custody, control and superintendence of the forest preserve" is given to that commission, but that act was passed and took effect May 15, 1885, and the section 93 above-cited was passed and took effect June 9, 1885. If the two are so inconsistent that both cannot exist, the earlier must yield to the later act. But, in my opinion, they do not conflict. The Forest Preserve consists of all the lands within certain specified limits which are owned by the State, and of this large tract of

land the commission is given the care, custody and control. It is the duty of that department to take all those proceedings and do all those acts which are necessary to fully protect the same, and secure to the State the benefit to be derived from its possession. But such care, custody and control need not necessarily interfere with the legal possession being held by the Comptroller for the benefit of the State.

So long as there is conflict and doubt over the title of any particular parcel, it is not certain that it is owned by the State, and, therefore, not certain that it is in the Forest Preserve. Therefore, it may well be that the actual possession which the State was willing to assume, to the end that the alleged owner might bring ejectment to establish his title, should be placed in the Comptroller. The question of actual possession is of importance only to those who, claiming to be owners, wish to attack the title of the State; and as to such lands the possession is given to the Comptroller without at all conflicting with the commission's care and custody of the Forest Preserve.

In *Saranac Land & Timber Co.* vs. *Roberts* (68 Fed. Rep. 521) the Circuit Court of the United States has held that, under this section, an action of ejectment may be maintained against the Comptroller, and, in my judgment, such construction of the statute is correct.

It remains to be determined whether, for any other reason, the complaint should have been dismissed.

The plaintiff has the title to the 585$\frac{3}{8}$ acres in question, unless the State has acquired it under the proceedings of 1881 or 1885, to sell the lands for taxes.

In November, 1881, such lands were offered for sale by the Comptroller in payment of delinquent taxes assessed against them for several years prior thereto. At such sale, a certain specific 100 acres thereof were bid off by one Talmadge for the full amount of taxes assessed against the tract, and a certificate to that effect was issued to him. On April 25, 1883, a notice was published by

the Comptroller to the effect that such 100 acres, describing them, were sold for arrears of taxes in November, 1881, and were still unredeemed, and that the sum of $112.92 must be paid by the 23d day of November, 1883, in order to redeem the same, otherwise a conveyance would be made to the purchaser thereof. In that notice the whole 585⅜ acres were given as the tract against which the taxes were assessed, and the 100 acres as the part thereof sold. Subsequently, on October 31, 1884, Talmadge having made default in the payment of his bid, and no redemption having been made by the owner, the Comptroller canceled the certificate to Talmadge and conveyed the whole 585⅜ acres to the State.

It is claimed by the plaintiff that such conveyance was utterly unauthorized and void.

It would seem that, up to the sale and issuing of a certificate to Talmadge, the proceedings were undoubtedly regular.

By section 47 of chapter 427, Laws of 1855, the Comptroller is given authority to cancel such a certificate at any time after three months, in case the purchaser shall not have paid the amount of his bid, or the same has not been collected from him. In the event that he does so cancel it, the Comptroller may either sell such certificate to any one who will pay the amount due upon it, or, if such sale cannot be made, he may transfer the same to the People of the State. Such was the provision of section 48 of the said chapter. By section 49 of such act, it was provided that the certificate issued to the new purchaser conferred upon him the same rights as he would have acquired had he been the successful bidder at the sale.

The statute also gave to the owner the right to redeem from the sale at any time within two years thereafter; and by section 61 it was provided that at least six months before the expiration of such two years the Comptroller should publish in each county a notice of the lands therein sold for taxes and still unredeemed, and the amount neces-

sary to redeem the same, and stating that unless redeemed by a specified day such lands will be conveyed to the purchaser.

Under these sections it is manifest that, in cases where the purchaser had made default and the certificate had been transferred to the State, the statements required to be made in the notice of redemption were, nevertheless, sufficient to apprise the owner of the actual situation. The amount to be paid was the same as if the original purchaser still held the certificate, and the lands sold and to be redeemed were the same, the State having taken under the certificate no more than the purchaser took.

But, by chapter 152, Laws of 1878, and section 3 of chapter 402, Laws of 1881, section 48, above cited, was amended so as to provide that, in all cases where the People of the State become the purchaser *by such transfer*, the whole quantity of land liable to sale for the purchase money mentioned in such certificate shall be covered by such purchase, the same as if no person had offered to bid at the sale.

Here was a radical change in the rights given to the State upon the acquisition of such a certificate; and it is manifest that if such change is not made until after the notice of redemption is given, its contents, instead of informing the owner, must mislead and deceive him.

Thus, in the case at bar, when the notice of redemption was given, Talmadge still held the certificate and stood in the position of purchaser. Although in default as to his payment, his certificate had not been canceled, nor had the State acquired it. The statement in the notice of redemption was correct—100 acres only had been sold, and those acres only were remaining "unredeemed." The owner, being so informed, chose to allow those acres to go unredeemed and thus pay the tax upon the rest. But after such notice, and after such action on the owner's part, the certificate upon which Talmadge had long been delinquent is canceled by the Comptroller, and the whole

585¾ acres are conveyed to the State. Not only has the owner had no notice that his 585¾ acres had been sold and must be redeemed, but, in effect, he has been told that only 100 acres thereof had been sold, and that the rest need not be redeemed. And, as a matter of fact, no more than 100 acres ever have been sold at a sale where competitive bidding was allowed.

Since the amendment of section 48, the claim of the State is that, having taken an assignment of the certificate, it has, under that section, become the purchaser of the whole 585¾ acres, the same as if it had bid off the same for want of other bidders at the time they were exposed for sale. But if such is the situation, then there has been an utter failure to give the notice of redemption required by the statute. Nor is it possible to give such a notice in any such case, unless the purchaser's certificate is canceled and the transfer made to the State before the expiration of eighteen months within which time the notice of redemption must be given. In other words, since the amendment it becomes necessary to vacate the purchaser's certificate and transfer the purchase to the State before the notice of redemption is given; and if such change is made after the notice, it is in effect as if no notice of redemption whatever had been given. Hence the proceeding, and the conveyance under it, gave no title to the State (*Bunner* vs. *Eastman*, 50 Barb., 640).

It is claimed, however, that such errors are cured by the statute of 1885 (chap. 448), above cited.

It has been held that such statute does not cure jurisdictional defects; and in *Ensign* vs. *Barse* (107 N. Y., 329), what are to be deemed jurisdictional in the sense so used is clearly pointed out (see, also, *Joslyn* vs. *Rockwell*, 128 N. Y., 334). I am of the opinion that the appropriation of the whole tract of 585¾ acres by the State, without any sale of the same, and after a notice to the owner that only 100 acres thereof had been sold and were to be redeemed, was a jurisdictional defect within the above decisions.

As to 485⅝ acres of his lands, the owner has never had any notice that the State had sold or appropriated or would sell or appropriate the same in satisfaction of the tax against them.

I conclude, with reference to the tax sale of 1881, that the State has acquired no title to the lands in controversy.

As to the sale of 1885, the same lands were again advertised for sale on acount of delinquent taxes for 1877 to 1882 inclusive, and bid off by the State, and a conveyance executed to it. Such sale was subsequently canceled by the Comptroller on the application of Millard and others, as owners; but such cancellation was utterly nugatory and did not at all affect the title of the State (*People* ex rel. *Millard* vs. *Roberts*, supra).

But, on such sale, we must assume that no competition whatever was allowed. By section 5 of chapter 402 of the Laws of 1881, amending section 66 of the Tax Law of 1855, it is provided that the Comptroller shall bid off all lands then belonging to the State, and shall reject any and all bids which may be made for any or all of said lands. These lands were then held by the State under the conveyance of October, 1884, and, therefore, the actual proceeding in 1885 was but an appropriation of the lands, without sale, to satisfy the taxes against them. It was but an assertion of ownership under the deed of October, 1884, and could not, in itself, add anything to the title which that conveyance gave (*Cromwell* vs. *MacLean*, 123 N. Y., 474, 489; *Turner* vs. *Boyce*, 11 Misc. Rep., 502, 512).

In order to render the conveyances to the plaintiff void for champerty, it must appear that, at the time they were taken, the lands were in the actual possession of the State, and that it was claiming under a title adverse to that of his grantors (*Dawley* vs. *Brown*, 79 N. Y., 390). Confessedly, all these lands were wild and unoccupied, not in the actual possession of any one, except so far as section 93 of the act of 1855, as amended in 1885, above cited, puts the actual possession in the Comptroller. Concede

that such possession was sufficient to render a conveyance champertous, yet the evidence does not disclose that any such possession had been acquired by the Comptroller prior to the advertisement begun on December 22, 1894. Before that time he had no possession whatever, and any conveyance taken by the plaintiff prior to that date is not to be discredited on that ground. It appears from the record that plaintiff holds title to these lands through two sources —one through the McCormick patent, issued by the State in 1798. Some of the conveyances to plaintiff transferring to him undivided interests in this title, were made prior to the date of such advertisement, and some subsequently to it. Such as were made prior to it were not champertous. The other source of the plaintiff's title is through a deed from the Comptroller to Turner and Marsh, executed December 21, 1891, and by them conveyed to the plaintiff, Turner conveying October 29, 1894, and Marsh conveying May 15, 1894. Both of such conveyances are prior to the Comptroller's advertisement, and, therefore, as to them, he was not in the actual possession when they were taken.

For these reasons it cannot be said that plaintiff's complaint should have been dismissed because his deeds were void for champerty.

Nor do I think that it can be said such lands were, at the time, the subject of controversy by suit in any court, within the meaning of section 129 of the Penal Code. These proceedings were before the Comptroller, and as matter of fact were dismissed because Millard and Ostrander had no right whatever to institute them. They were not proceedings that could in any way affect the title which they assumed to convey to plaintiff. Nor can the conveyances from them, or from Turner and Marsh, be treated as a sale and purchase of a pretended title in violation of section 130. Although no one had the *actual* possession, yet the title of Turner and Marsh, coming directly from the State and from them to the plaintiff, the con-

structive possession which follows such title, in the absence of any adverse holding, is sufficient to relieve it from the condemnation of that statute (*Wright* vs. *Syracuse, etc., R. R. Co.*, 92 Hun, 32).

Moreover, as I understand this record, the State on December 21, 1891, conveyed those lands to Turner and Marsh. The deed is not before us, but I do not understand that it assumed to then convey any less title than the State then had. It seems to have been introduced by the defendant to show title out of plaintiff, and thus defeat his action of ejectment. But the plaintiff replies by showing a conveyance of that title from Turner and Marsh to himself. Thus, under this title, he seems to have established his right as against the State, to the lands in question, even though the State did acquire a good title to the same under the sale of 1881 and 1885. Whatever title the State acquired through those sales, would seem to have passed by its conveyance to Turner and Marsh in 1891.

Thus, if this action could be maintained at all, there does not seem, on this record, to be any reason why the title of the plaintiff is not good as against the State, and, therefore, the complaint should not have been dismissed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred, except Merwin, *J.*, dissenting, and Putnam, *J.*, not sitting.

Judgment reversed and a new trial granted, costs to abide the event.

FILED
DEC 5 1898
JAMES H. ROBERTS,
Clerk.

No. 94.

ON THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1898.

No. 94

THE SARANAC LAND AND TIMBER COMPANY,
Plaintiff in Error,

against

JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN C. DAVIES,
Attorney General.

THEODORE R. HANCOCK,
Counsel for Defendant in Error,
Albany, N. Y.

ALBANY:
THE BRANDOW PRINTING CO.,
DEPARTMENT PRINTERS.
1898.

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OCTOBER TERM, 1899.

No. 94

THE SARANAC LAND AND TIMBER COMPANY,
PLAINTIFF IN ERROR,

against

JAMES A. ROBERTS, AS COMPTROLLER OF THE STATE OF NEW YORK, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

JOHN C. DAVIES,
Attorney-General.

THEODORE E. HANCOCK,
Counsel for Defendant in Error,
Albany, N. Y.

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UNITED STATES SUPREME COURT.

THE SARANAC LAND AND TIMBER COMPANY,
Plaintiff in Error,

v.

JAMES A. ROBERTS, as Comptroller of the State of New York,
Defendant in Error.

No. 94

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This case is brought into the Supreme Court of the United States on a writ of error directed to the Circuit Court of the United States for the Northern District of New York. The action was commenced by The Saranac Land and Timber

Company against James A. Roberts, as Comptroller, to test the title of the State of New York to 7,500 acres of land in the town of Harrietstown, Franklin county, N. Y. (Pages 2 and 3.) It is a part of the same township of land involved in the case of Benton Turner, plaintiff in error, against the People of the State of New York, reported in 168 U. S. 90. The Turner case related to 7,500 acres of land in the southeast quarter of Township 24, Great Tract 1, Macomb's Purchase; and the present case relates to 7,500 acres of land in the northwest quarter of Township 24, Great Tract 1, Macomb's Purchase. The land in dispute is a part of the Forest Preserve of the State, and it is made a part of the duties of the Board of Fisheries, Game and Forests to maintain and protect the same and to defend actions involving the State's title. (Chap. 31, General Laws, art. XII; Banks & Brothers' Revised Statutes, 9th ed., vol. 1, pp. 917, 918; People ex rel. Forest Com. v. Campbell, 152 N. Y. 51.)

The plaintiff was organized on or about December 24, 1894, under the laws of the State of New Jersey, evidently for the purpose of attempting to secure title to this land and commencing this action of ejectment. (Page 19.) The record recites that one of the purposes of its organization was the bringing of this suit in the United States Circuit Court. All of its property is located in the State of New York. (Page 20.)

The State Comptroller commenced to advertise himself in possession of the land upon December 22, 1894, and continued the advertisement for three weeks. As before stated, this corporation was organized December 24, 1894, and the suit was commenced January 29, 1895. (Page 17.) The land in controversy was sold for nonpayment of taxes and conveyed to the State upon four different tax sales, viz.: 1877, 1881, 1885, and 1890. (Pages 17, 18.)

(1) The first certificate was issued by the Comptroller October 18, 1877; the deed was executed by the Comptroller to the People of the State of New York, June 9, 1881, and recorded in Franklin county clerk's office, June 8, 1882; "which deed was in the usual form of deeds made by the Comptroller upon sale of lands for taxes, and purported to convey to the People of the State of New York the northwest quarter of Township 24, Great Tract 1, Macomb's Purchase." This sale was for unpaid taxes for the years 1866 to 1870. It was a sale of the whole northwest quarter of Township 24, Great Tract 1, Macomb's Purchase." (Page 17.)

(2) Upon the tax sale of 1881 to the People of the State of New York, two certificates were issued, each dated November 23, 1881. One conveyed the northwest one-quarter of this same Township 24, excepting 1,000 acres at the northwest corner, and also excepting 1,215 acres of water; the other certificate conveyed this 1,000 acres contained in the northwest corner of the northwest one-quarter of Township 24. The deed executed in conformance with these tax sales and the certificates so issued, was dated October 31, 1884, and recorded in Franklin county clerk's office March 5, 1887. These sales were for unpaid taxes of years 1871 to 1876, inclusive. (Page 17.)

(3) Upon the tax sale of 1885 two certificates were issued to the People of the State of New York by the Comptroller under date of December 29, 1885. The first of these certificates conveyed the northwest one-quarter of Township 24, excepting 1,000 acres at the northwest corner; and the other certificate showed the sale by the Comptroller to the People of the State of 1,000 acres in the northwest corner of the northwest one-quarter of Township 24. The deed executed to the People of the State in pursuance of these certificates was executed February 15, 1890, and recorded in Franklin

county clerk's office March 3, 1891. This tax sale was for unpaid taxes for the years 1852 to 1855, inclusive, and 1877 to 1879, inclusive.

(4) The land was again sold by the Comptroller for unpaid taxes in 1890, and a certificate issued to the People of the State of New York, conveying the northwest one-quarter of said Township 24, excepting 1,000 acres at the northwest corner. This certificate is dated September 23, 1890, and the sale was for unpaid taxes of the years 1861 to 1865, inclusive. (Page 18.)

It thus appears that the owners of the land commenced to make default in the payment of taxes in the year 1852, and that the amount due and owing the State for unpaid taxes upon the premises aforesaid is very large. No attempt has ever been made to redeem from any of these tax sales.

In the year 1894 this foreign corporation was organized for the purpose of commencing an action in the United States Circuit Court to recover from the State the possession of the lands aforesaid without any suggestion that there has ever been any attempt made to pay the taxes or that there is any intention of so doing in case of a recovery. The plaintiff seeks to recover the 7,500 acres of land upon two theories: 1. That chapter 448 of the Laws of 1885 and chapter 711, Laws of 1893, limiting the time within which actions of this character should be commenced, are unconstitutional; and 2. That certain irregularities which are alleged to have been incident to these tax sales constitute defects of a jurisdictional nature.

POINTS.

I.

The constitutionality of chapter 448 of the Laws of 1885 and chapter 711 of the Laws of 1893 as statutes of limitations is no longer an open question.

Upon the 9th day of June, 1885, the Legislature of the State of New York passed an act amending the general tax laws of the State. The amendatory statute reads as follows:

AN ACT to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of nonresidents and to provide for the sale of such lands for unpaid taxes."

Passed June 9, 1885; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of nonresidents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

§ 65. Such conveyances shall be executed by the Comptroller under his hand and seal, and the execution thereof shall be witnessed by the Treasurer or Deputy Comptroller, and all such conveyances that have been heretofore executed by the Comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been

recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the Comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, *be conclusive evidence that the sale and all proceedings prior thereto*, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, *were regular and were regularly given*, published and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the Comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the Comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

§ 2. The provisions of this act are hereby made applicable only to the following counties, namely: Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly

made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

§ 3. This act shall take effect immediately.

The validity and constitutionality of this particular statute is res adjudicata.

People v. Turner, 117 N. Y. 227.
People v. Turner, 145 N. Y. 451.
Turner v. New York, 168 U. S. 90.

Similar statutes have been repeatedly construed as not in contravention of the Federal Constitution and as valid for the purpose of limiting the time within which actions similar to this shall be commenced.

Geekie v. Kirby-Carpenter Co., 106 U. S. 379.
Terry v. Anderson, 95 U. S. 628.
In re Brown, 135 U. S. 701.
Williams v. Supervisors of Albany, 122 U. S. 163.
Townsen v. Wilson, 9 Penn. 270.
Bronson v. St. Croix Lumber Co., 44 Minn. 251.
Coulter v. Stafford, 48 Fed. Rep. 266.
L. & R. Imp. Co. v. Barden, 45 Fed. Rep. 706, 711.
Ensign v. Barse, 107 N. Y. 329.
Ostrander v. Darling, 127 N. Y. 70.
Allen v. Armstrong, 16 Iowa, 508.
Smith v. Cleveland, 17 Wis. 563, 571.
Freeman v. Thayer, 33 Me. 83.
Raley v. Guinn, 76 Mo. 270.
Pillow v. Roberts, 13 How. 472.

The record of this case establishes the following facts:

1. The owners have neglected to pay any taxes for at least thirty years.

2. The property was sold for nonpayment of taxes in 1877; the certificate was issued October 18, 1877.

3. The property was deeded to the State June 9, 1881.

4. The deed was recorded June 8, 1882.

5. There apparently was never any effort made by any owner to pay the taxes, or to redeem, after the property was sold.

6. This corporation, the plaintiff, secured title to the property on or about December 24, 1894, and commenced this suit January 25, 1895, over seventeen years after the first sale for the nonpayment of taxes, and the certificate of sale was issued to the State, and over twelve years after the first tax deed was recorded.

Under the provisions of the statute quoted, the certificates issued to the State and deeds recorded had become conclusive evidence of the regularity of the proceedings long before the commencement of the action, and properly so. The tax laws of the State of New York give ample opportunity to every property-owner to pay his taxes or to redeem after his property has been sold.

(a) If the owner felt himself aggrieved by any imposition of taxes, he could appear before the assessors on the third Tuesday of August and make his grievances known (Laws of 1851, chap. 176, and Laws of 1857, chap. 536), or he could appear before the board of supervisors at their next meeting. (Laws 1851, chap. 176, § 5.)

(b) The Comptroller was compelled by statute to wait for two years from the first day of May following the year when the taxes were assessed, before commencing to advertise and sell. (Laws 1855, chap. 427, §§ 4, 33.)

(c) The Comptroller was compelled by statute to advertise for ten weeks in newspapers of the county, in addition to publication in the State paper; also for twelve weeks successively in all the newspapers in the State designated for printing the Session Laws. (Laws 1855, chap. 427, §§ 34, 41.)

(d) The owner or occupant, or any person interested in the land, may redeem the same at any time within two years after the last day of the sale. The Comptroller must, at least six months before the expiration of the two years, cause notices to be published at least six weeks successively, and completed at least eighteen weeks before the expiration of the two years allowed for redemption, which notices are to be published in each county of the State, specifying each parcel of land unredeemed, the amount to be paid, and that the land will be conveyed to the purchaser unless redeemed by a certain day. If no person redeems the land at the expiration of the time specified, the Comptroller is authorized to convey the same to the purchaser, which vests in the grantee "an absolute estate in fee-simple." If there is any person in occupancy of the land, or any part thereof, at the time of the expiration of the two years, the grantee, within two years of the expiration of the time to redeem, must serve a written notice on the occupant allowing the occupant, or any other interested person, six months' additional time to redeem. (Laws 1855, chap. 427, §§ 50, 61, 63, 68, 70.)

The parties interested in these lands, without making any effort to pay the taxes or to redeem from the sales which had been made to the State, have waited until the land has become greatly enhanced in value and has been appropriated by the State as a part of its Forest Preserve, and now attempt to vacate the tax sales and regain the property sold, on account of alleged irregularities in the proceedings. The taxes which

have accumulated since the owners of the property first omitted to pay the taxes assessed, including the interest down to the present time, would amount to about $30,000. It is apparent that there is no equity in the case of the plaintiff in error; that no attempt has been made by the owners of this property to protect their rights, or to pay the taxes which have accumulated on this property, of which they must, as a matter of law and of fact, had full knowledge, and that an attempt is now being made to deprive the State of its property upon technicalities.

It is respectively submitted that the statute of 1885, and similar statutes of this State have been passed for the express purpose of limiting the time within which actions of this nature can be commenced, and that the constitutionality of such laws is no longer a question of dispute.

Laws 1885, chap. 448.
Laws 1893, chap. 711, § 12.

The latter section reads as follows:

"Sec. 12. Effect of former deeds.— Every such conveyance heretofore executed by the Comptroller, county treasurer or county judge, and all conveyances of the same lands by his grantee or grantees therein named, which have for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the Comptroller, that shall have remained in force for two years after the last day allowed by law for redemption from such sale, shall be conclusive evidence that the sale and proceedings prior thereto, from and including the assessment of the lands, and all notices required by law to be given previous to the expiration of the time allowed for redemption, were regular and were regularly

given, published and served according to the provisions of all laws directing and requiring the same, or in any manner relating thereto, but all such conveyances and certificates, and the taxes and tax values on which they are based, shall be subject to cancellation on direct application to the Comptroller, or in an action brought before a competent court therefor by reason of the payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid, or by reason of any defect in the proceedings affecting the jurisdiction upon constitutional grounds."

II

The defects complained of by the plaintiff in error were simply irregularities, and not of a jurisdictional nature.

The learned counsel for the plaintiff in error cites various cases in which certain defects are held to be jurisdictional when considered without reference to statutes of limitations prescribing the time within which actions shall be brought to set aside tax sales and conveyances, or to recover land sold for the nonpayment of taxes. The distinction between jurisdictional, as used in a direct action without the intervention of a statute of limitations or curative statute, and as used in connection with such a statute, is clearly pointed out in Ensign v. Barse, 107 N. Y. 346.

Defects Complained of by Plaintiff in Error.

First. It will be found that the principal requests for rulings upon questions of law (pages 12, 13, 23, 24) and the principal assignments of errors (pages 32, 33) are based upon the following alleged defects, to-wit:

That at the tax sale of 1877 the land in controversy, the northwest quarter of Township 24, was sold to the State for the unpaid taxes of 1866, 1867, 1868, 1869, 1870; that in 1866 and 1867 this northwest quarter was assessed and taxed as one parcel of 7,500 acres; that in 1868, 1869 and 1870 two parcels were assessed, viz.: (A) The northwest quarter, excepting 1,000 acres lying in the northwest corner, and also excepting 1,215 acres of water. (B) 1,000 acres lying in the northwest corner of the northwest quarter.

It is to be noted

1. That it is not claimed that the taxes were levied or assessed by the wrong town or ward.

2. It is not claimed that any of the taxes were paid.

3. The sale was concededly for unpaid taxes.

4. The taxes were regularly assessed.

5. No attempt was ever made to redeem.

6. No complaint was made to the assessors or board of supervisors.

7. No action was commenced for the purpose of vacating the tax sale or conveyance.

8. It is not claimed that the notices required by law were not regularly given, published and served.

It is now urged, twenty years after the sale, that the form and manner of sale was improper.

The counsel, to sustain his contention, relied in the court below principally upon two Special Term decisions made by the same judge. (Turner v. Boyce, 11 Misc. 502; Marsh v. Ne-ha-sa-ne Park Association, 18 id. 314.)

The reasoning of the learned judge in these two cases, as far as applicable to the case now before the court, has been overruled.

Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 36.

The facts in this case were almost identical with the one now under consideration.

In the case of Marsh v. the Park Association an entire tract of land was assessed and taxed as a whole for each one of four years, and the taxes returned unpaid to the Comptroller. The tax upon the northeast quarter of the tract was then paid for two of the years, leaving the taxes of two years against the whole tract unpaid, and the taxes of all four years unpaid as against the whole tract, except the northeast quarter. The whole tract was then sold for the unpaid balance of the taxes of all four years. The court, in its opinion, says:

"The Comptroller's sale was made in 1843, and was irregular and could have been vacated if it had been seasonably attacked. Prior to the statute of 1885, the Comptroller's deed was only presumptive evidence of the regularity, and, consequently, of the validity of the sale." (Laws 1855, chap. 427, § 65.)

"The return to the Comptroller of the unpaid taxes for the years 1836, 1837, 1838 and 1839 shows the assessment to have been upon the entire township number 38, containing 20,000 acres, except certain designated parts thereof, which either were not embraced in the assessment, or upon which the taxes had been paid. Among the excepted parcels for the years 1836, 1837 was the northeast quarter — 5,000 acres — which quarter embraces the *locus in quo*, upon which the taxes for 1836, 1837 were paid before return was made to the Comptroller.

"But the taxes upon the northeast quarter for the years 1838, 1839 were unpaid, and the Comptroller, therefore, had the right to sell the quarter. But as the township was wild forest land, with no visible allotments into the respective

parcels of the several owners thereof, the northeast parcel was taxed as part of the larger parcel, from which it was not visibly separated. This was permissible. Upon other portions of the larger parcel the taxes of 1836, 1837 were unpaid, and also the taxes for 1838, 1839. The Comptroller sold the larger parcel, embracing the northeast quarter, and thus the *locus in quo* for all the unpaid taxes for the years 1836, 1837, 1838 and 1839.

"Under the laws then existing, the owner of the northeast quarter could not have redeemed it by paying the amount properly chargeable upon it, but would have been obliged to pay the proportion of the unpaid taxes upon all the parcels which his acreage bore to the whole acreage, and as that amount was increased by the taxes of 1836, 1837 upon the other parcels, the owner of the land would have been obliged to pay more than he owed. The sale, therefore, was invalid, and, no doubt, it would have been so held if it had been seasonably attacked. (People v. Hagadorn, 104 N. Y. 516.) * * *

"But the taxes of 1838, 1839 were not paid, and the sale was for such unpaid taxes. The Comptroller had jurisdiction to make that sale, and ought to have observed the statutory regulations then in force. He made the sale, and it is now challenged because he did not observe the statutory regulations, but disregarded them by selling this land in a parcel which embraced other lands upon which the taxes for four years — 1836, 1837, 1838 and 1839 — were unpaid.

"Thus, the form and manner of the sale are now attacked. That means that the Comptroller, in making the sale, abused his jurisdiction as to the form and manner, or erred in exercising it, nothing more. The unpaid taxes were like a judg-

ment, and the Comptroller's sale is like a sheriff's sale upon execution, which may be vacated if not made in proper form and manner. But the owner, like the judgment debtor, may waive the irregularities. Neither can get rid of the tax or judgment except by paying it, and it may not be worth his while to take the trouble to move when the successful result of his motion will still leave the tax or judgment unsatisfied. It is obvious that these irregularities are not jurisdictional, in the sense that they lie at the foundation of the Comptroller's power to sell, or that they take it away from him altogether, but only in the sense that his power to sell in this form and manner may be challenged, and such sale set aside. (Ensign v. Barse, 107 N. Y. 329.)

"This is very different from a sale where there are no taxes unpaid. The one cannot be made at all, and the other ought to be made in due form and manner. The one cannot be cured, the other ought to be, and after a reasonable lapse of time it should be regarded as cured if the owner meantime makes no objection. It is proper to have evidence of this waiver, and this the Comptroller's deed, two years after its record, affords.

"In this case the time allowed for the owner to complain expired, and the owner did nothing. The statutes declare in effect that his day has gone by, and that the Comptroller's deed is, therefore, conclusive evidence in the material facts which the plaintiffs now seek to controvert."

Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 36, 39, 40.

In the case of Ensign v. Barse, 107 N. Y. 329, we find the same defects as are complained of by the plaintiff in error in this case. These points were distinctly raised in the brief of

the appellant's counsel, which we find in the bound volume of cases. Counsel for the appellant in his brief upon the appeal urged that the tax sale "was void for the reason that the taxes of four separate years were blended in one sale," and further, that "two distinct parcels of land owned in severalty, situate on the same lot, assessed together every year as non-resident lands, one piece being fifty acres, and the other being 150 acres; the owner of the fifty acres, before the tax sale, paid his taxes thereon, for all the years except 1867. The owner of the 150 acres did not pay his taxes for any of those years. The Comptroller sold the whole 200 acres together, for the taxes remaining unpaid on both pieces."

The Court of Appeals held that these irregularities, as well as a large number of others commented upon at great length by the counsel for the appellant, did not render the tax sale void, and were not defects of a jurisdictional nature.

Ensign v. Barse, 107 N. Y. 329.

We have called attention in our first point not only to the adjudication of the courts relating to chapter 448 of the Laws of 1885, but also to numerous other cases holding the validity of curative statutes specifying the time limit within which actions shall be brought for the purpose of setting aside tax sales, or recovering possession of lands sold for nonpayment of taxes; also to the proposition that numerous cases can be cited by counsel attacking tax sales where the effect of statutes of this kind have not been taken into consideration. The criticism made by the plaintiff in error is directed to the alleged irregular procedure on the part of the Comptroller in selling the land; it is not claimed that he did not have the power and jurisdiction to make a sale, but that his procedure

in selling was not in accordance with statute. The uniform lines of decisions bearing upon short statutes of limitations relating to actions of this character is to the effect that where the taxing officers have the power and right to act, and their procedure is wrong, the Legislature has power to do retrospectively the same that it could have done antecedently.

It may be stated as an indisputable proposition that a departure from the strict letter of a statute cannot be said to be a jurisdictional defect, in a constitutional sense, which, had it been directed by statute, would not have rendered the statute constitutional, and that a curative statute may validate acts which the Legislature might originally have authorized, and limit the time within which actions to set aside tax sales based upon irregularities shall be commenced.

Ensign v. Barse, 107 N. Y. 339–346.
People v. Turner, 117 N. Y. 238, 239.
People v. Turner, 145 N. Y. 451.
People ex rel. Flower v. Bleckwenn, 55 Hun, 169.
Matter of Lamb, 51 Hun, 633.

In this case the land was properly assessed, default was made in the payment of taxes concededly due, the Comptroller had the power to sell, and the only fault found is with the Comptroller's method of procedure in making the sale. The only objection appears to be that the Comptroller bunched different taxes together, and that, as a result, some of the land was sold for taxes that were not legally due upon it. As we have before stated, this is the precise question that was passed upon by the New York courts in the cases of Ensign v. Barse, 107 N. Y. 329, and Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 36.

The United States courts will follow the decisions of the State courts in the construction of the State statutes relating to the forms of assessments, and methods of procedure in making sales.

Palmer v. McMahon, 133 U. S. 660.
Amy v. Dubuque, 98 U. S. 470.
Lamborn v. County Com., 97 U. S. 181.
Harpenday v. The Dutch Church, 16 Pet. 455.
Green v. Lessee of Neal, 6 Pet. 58.
De Wolf v. Robaud, 1 Pet. 476.
Catheart v. Robinson, 5 Pet. 263.
Bergman v. Bly, 66 Fed. Rep. 40.
Sandford v. Poe, 69 Fed. Rep. 546.
Christy v. Pridgeon, 4 Wall. 196.
Lane County v. Oregon, 7 Wall. 71.
State Railroad Tax Cases, 92 U. S. 618.
Witherspoon v. Duncan, 4 Wall. 217.

In view of the laws with reference to redemption of lands sold for nonpayment of taxes, it is difficult to spell out any grievance, real or imaginary, sustained by the owners of the land under discussion. Chapter 427, Laws of 1855, contains ample and specific provision and directions for the protection of persons whose lands have been sold for the nonpayment of taxes, if they desire to redeem the same at any time within two years after the last day of sale.

Section 50 permits the redemption of all of the lands sold. Section 51 authorizes the redemption of an undivided part of the land upon payment of a proportionate part of the money realized upon the sale.

Section 52 authorizes the redemption of an undivided share of an undivided part of land sold for taxes.

The sections before referred to, together with sections 53, 54 and 55, were drawn with great particularity, for the purpose of covering apparently every possible contingency that might present itself. It will not be seriously urged that if the owner of the land sold for nonpayment of taxes at the 1877 tax sale had really desired to pay this tax upon the whole tract, or any particular subdivision of the same, ample opportunity would not have been afforded him to do so.

The Comptroller was authorized to bunch the taxes at the tax sale of 1877, and there is fair ground for argument that this was not even an irregularity.

Fellows v. Denniston, 23 N. Y. 437, 438.

Second. The seventh proposition of law, and the seventh assignment of error raised by the counsel for the plaintiff in error (pages 13-34), is as follows: "If the court shall find that at the sale of 1881 the Comptroller treated the land in question as already the property of the State, and struck the same off to the State without giving any opportunity for other persons to bid thereon, then the State acquired no title by reason of said sale, and said sale was not validated or made effectual by chapter 448 of the Laws of 1885, or by chapter 711 of the Laws of 1893." This does not require any extended discussion or consideration because it is based upon the theory that the 1877 tax sale was void, and conveyed no title to the people of the State of New York. Inasmuch as we have demonstrated that the counsel's major premise is wrong, it will not be necessary to repeat the argument already produced.

The Comptroller, in making the subsequent tax sales of

1881, 1885 and 1890, simply followed the statutory provisions directing him to bid in for the State all lands liable to sale for nonpayment of taxes which then belong to the State. Inasmuch as at the time of the 1881 tax sale, the time to redeem had expired, and a deed of the lands in question had been executed to the people of the State, it became the duty of the Comptroller to bid in these lands for the State. The same would be true with reference to the tax sales of 1885 and 1890.

Laws of 1881, chapter 402, section 5, amending section 66, page 547. This section reads in part as follows:

"§ 66. 1. It shall be the duty of the Comptroller, at any tax sale held by him, to bid in for the State all lands liable to sale thereat then belonging to the State or that are then mortgaged to the commissions for loaning certain moneys of the United States; and to bid in for each of the counties of the State all other lands liable to be sold thereat then belonging to said counties, respectively, and also all lands which may have been bid in by or for said counties, respectively, at any tax sale which has not been canceled, or from which said lands may not have been duly redeemed, and to reject any and all other bids which may be made for any or all of said lands." * * *

Third. The plaintiff in error complains that the description "Northwest corner of Northwest quarter, 1,000 acres," and the description, "Macomb's Purchase, Great Tract 1, Township 24, Northwest ¼ Ex. 1,000 a. N. W. corner and 1,215 a. water 5,285 acres," are void for uncertainty. This does not appear to be a point of very much importance, for the reason that the taxes for the years 1866 and 1867 were upon the whole northwest one-quarter of Township 24, and the tax sale of 1877 as well as the deed of 1881 was of the

same northwest quarter, without exceptions or reservations. (Pages 17, 21.)

There, however, is no uncertainty in the description, as the 1,000 acres would be in the form of a square.

Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 40.
Dolan v. Trelevan, 31 Wis. 147.
Bowers v. Chambers, 53 Miss. 259.
Dox ex dem. Hooper v. Clayton, 81 Ala. 391.
Lessee of M. Walsh v. Ringer, 2 Ohio, 328.
Prior v. Scott, 87 Mo. 308.
Enochs v. Miller, 60 Miss. 19.
McCready v. Lansdale, 58 Miss. 877.
Bybee v. Hageman, 66 Ill. 519.
Colcord v. Alexander, 67 Ill. 581.
Mayor v. Brush, 7 Ind. 232.

The counsel for the plaintiff in error appears to have been impressed with the idea that there was some importance to be attached to the fact that there was not 1,215 acres of this tract covered by water in 1895. If we correctly understand the counsel's computation, his measurements in 1895 make the amount under water 1,033.89 acres. (Page 22.) The defendant then gave evidence to the effect that there were about 200 acres more of land under water during years 1866 to 1870 than at the time plaintiff in error made its measurements. (Page 23.) The counsel then stipulated that there was no question of fact for the jury, so it would appear that the description of the 1,215 acres was accurate, and it was concededly accurately located. This was, of course, contained in the tax sale of 1877, and conveyance of 1881.

Fourth. The objection that the court erred in receiving in evidence the certificate of sale issued by the Comptroller

to the People of the State of New York upon the tax sale of 1890 was not well taken, if of any importance. (Page 34.) This sale was for the unpaid taxes 1861 to 1865, inclusive. (Page 18.) This certificate was conclusive evidence of the regularity of the proceedings.

Laws 1885, chap. 448, § 1.
Laws 1893, chap. 711, § 12.

The statute requires a certificate of purchase to be issued to the purchaser.

Laws 1855, chap. 427, § 46.

If there is no redemption the purchaser, his heirs or assigns are entitled to a deed.

§ 63, chap. 427, Laws 1855.

A conveyance of the land by the purchaser is an assignment of the certificate.

§§ 160, 162, Black on Tax Titles.
Pages 329, 330, Blackwell on Tax Titles, 4th ed.

The certificates, especially after the time to redeem expires, creates an estate in the land, the language of the statute being that *the certificate passes to the heirs.*

Laws 1855, chap. 427, § 63.

A certificate of purchase given at a tax sale is equally under the protection of the law as a tax deed, and is just as efficacious as a deed to bar the owner's rights.

Laws 1885, chap. 448.
Laws 1893, chap. 711, § 12.
Laws 1896, chap. 908, § 132.

The owner of a valid certificate of a sale for taxes to whom a deed fatally defective in form shall have been issued, may compel the execution of a proper deed by mandamus.

Page 331, Blackwell on Tax Titles, 4th ed.

§ 205, Black on Tax Titles.

III.

The predecessors in title and interest of the plaintiff in error had ample opportunity to test the regularity of the tax proceedings and sale, and the plaintiff in error cannot now be heard to complain on account of the bar of the Statute of Limitations.

In the case before cited in our second point in which the same defects were alleged as are now complained of by the plaintiff in error, the court said:

"The State was the purchaser at that sale, and if the Comptroller could have canceled the sale, the owner had his opportunity to have his day in court before that officer. The distinction between the case where the State is the purchaser and where an individual is a purchaser is stated by the Court of Appeals in the Turner case, and referred to as unimportant in the opinion in the Supreme Court of the United States in the same case, referring to the case of People v. Roberts, 151 N. Y. 540, since the owner had his opportunity to seek his remedy in the Supreme Court, whether he had one before the Comptroller or not. *The answer to the plaintiff's contention that it is sought to deprive them of their property without due process of law is, that the State gave them, or their grantor, the opportunity to protect their land by due process of law, and they would not resort to it.*"

Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 34.

It appears from the record that independent of the terms of the statute establishing the Forest Commission (Chap. 283, Laws 1885), and the Fisheries, Game and Forest Commission (Chap. 395, Laws 1895; chap. 31, General Laws, Banks & Bros.' Rev. Stats., 9th ed., 871), " the lands described in the complaint were in the actual possession of the Forest Commission of the State of New York from 1885 up to the time of the commencement of this action, and that the deeds to the plaintiff were made and executed and delivered at times when the grantor was out of possession of said premises." (Printed record, page 20, side paging 40.)

Moreover the act establishing the Forest Commission placed that body in actual possession of the land in question.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.
People v. Turner, 145 N. Y. 451.
Turner v. New York, 168 U. S. 90.

It is idle for the plaintiff in error here to claim that the former owners of the land did not have ample opportunity to protect their rights, and to secure redress for any alleged grievances.

1. Parties owning or interested in the property were deprived of no constitutional or substantial right. Chapter 176, Laws 1851, section 5, provided that " Any person aggrieved by the assessment of the assessors may appeal to the board of supervisors, at their next meeting, who shall have power to correct and review such assessment."

2. The owners and parties in interest had until the expiration of six months after June 5, 1885, to bring any action they desired to vacate the tax, or any sale, conveyance or certificate made thereunder, or to regain possession of the land. (Laws 1885, chap. 448, § 2.)

The owner was authorized to bring a direct action against the Comptroller to vacate the tax sale or conveyance or certificate of sale made thereunder. (Laws 1885, chap. 448.) If it be conceded that the owner could not apply to the Comptroller for cancellation, he could nevertheless proceed against him by action. If the Comptroller could not be made a judge to try conflicting titles on application by the owner, he could be made a party in an action brought by the owner.

The distinction is plain. The form of proceeding would be different; the relief and result would be the same. Where the State is the purchaser it would be absurd to argue that if the owner is not permitted to apply to the Comptroller for cancellation, but must pursue another method to secure the same relief, he is, therefore, deprived of a constitutional right, and still more absurd to claim that the State would not be bound by an action brought against the Comptroller to the same extent as by an application for cancellation made to the Comptroller. Not only applications, but actions, are referred to in the statute, and it is plain that the word "action" is not used in any narrow or technical sense.

3. The Forest Commissioners could have been made defendants.

Section 11, chapter 283, Laws 1885, provided: "The Forest Commission may bring in the name or on behalf of the People of the State of New York, any action to prevent injury to the Forest Preserve * * * which any owner of lands would be entitled to bring. * * * With the consent of the Attorney-General and the Comptroller, the Forest Commission may appoint attorneys and counsel to prosecute any such action or to defend any action brought against the Commission or any of its members or subordinates arising out of their or his official conduct with relation to the Forest Preserve."

The court held, in People v. Turner, 145 N. Y. 461, that the State held, through the Forest Commission, the actual possession of the lands in question.

About the correctness of this proposition there is no room for question. The Court of Appeals again held this explicitly in 151 N. Y. 540, in the case of People ex rel. Millard v. James A. Roberts, Comptroller. In that case O'Brien, J., says: "If the sale is invalid, his title (the owner's) is not affected, and he may keep and defend his possession, or if put out of possession, regain it by action of ejectment." In this case the land had been bid in for the State at a tax sale and duly deeded to the State by Comptroller's conveyance.

Still more recently, the Court of Appeals, in the case of People ex rel. The Forest Commission v. Campbell, 152 N. Y 51, has held that the possession of that Commission is the possession of the State and they may sue or be sued accordingly. They may defend their possession of the lands in the Forest Preserve.

The court says: "The act (instituting the Forest Commission) clearly contemplates not only actions brought by the Commission in the name of the State, but actions against the Commission or any of its members or subordinates arising out of their official action."

The case referred to in 152 N. Y. reaffirms the doctrine laid down in 145 N. Y. The court says: "The case of People v. Turner, referred to in the opening of this opinion, was affirmed in this court (145 N. Y. 451), and it was then held that the State was placed in constructive possession of the lands in question, through the Comptroller's purchase and deed, but that subsequently it was in actual possession by reason of the creation of the Forest Commission and the powers and duties devolved upon it by the act of 1885. The possession of the Commission is the possession of the State."

Here, then, we have three distinct declarations by the Court of Appeals of the State of New York that the Forest Commission, by virtue of chapter 283 of the Laws of 1885, was placed in the actual possession of the Forest Preserve, empowered not only to bring, but to defend, actions, and the further holding that their possession is the possession of the State.

Chapter 283 went into effect May 15, 1885, and the Validating Act (Chap. 448) went into effect June 9, 1885. We quote from 152 N. Y. 57: "It is necessary to determine the precise powers conferred upon the Forest Commission by chapter 283 of the Laws of 1885. The first section of the act creates the Commission; the seventh section defines what lands shall be known as the Forest Preserve; and the ninth section declares 'the Forest Commission shall have the care, custody, control and superintendence of the Forest Preserve.' The subsequent provisions of the act confer numerous and detailed powers upon the Commission, but those bearing upon this case are to be found in section 11, which provides, among other things, as follows: 'The Forest Commission may bring in the name, or on behalf, of the People of the State of New York any action to prevent injury to the Forest Preserve or trespass thereon; to recover damages for such injury or trespass; to recover lands properly forming part of the Forest Preserve, but occupied or held by persons not entitled thereto, and in all other respects for the protection and maintenance of the Forest Preserve, which any owner of lands would be entitled to bring.' The section proceeds to confer upon the Commission detailed powers in bringing actions for trespass, and then closes as follows: 'With the consent of the Attorney-General and the Comptroller, the Forest Commission may employ attorneys and counsel to prosecute any such action, or to defend any action brought against the Commission, or any of its members or subordinates arising out of their or

his official conduct with relation to the Forest Preserve. Any attorney or counsel so employed shall act under the direction of and in the name of the Attorney-General. Where such attorney or counsel is not so employed, the Attorney-General shall prosecute and defend such actions.'

"It will thus be observed that the Commission is given the absolute care, custody, control and superintendence of the Forest Preserve, and are authorized for its protection and maintenance to bring any and all actions and proceedings which an owner of land would be entitled to institute. The Commission may retain counsel with the consent of the Attorney-General and Comptroller, and, if this is not done, it is made the duty of the Attorney-General to act in their behalf. The act clearly contemplates not only actions brought by the Commission in the name of the State, but actions against the Commission, or any of its members or subordinates arising out of their official action.

"It is difficult, when we consider these sweeping provisions, to believe that it was not the intention of the Legislature to clothe the Commission with the amplest and most complete powers to represent the State in the Forest Preserve.

* * * * * * *

"The case of People v. Turner, referred to in the opening of this opinion, was affirmed by this court (145 N. Y. 451), and it was there held that the State was placed in constructive possession of the lands in question through the Comptroller's purchase and deed, but that subsequently it was in actual possession by reason of the creation of the Forest Commission, and the powers and duties devolved upon it by the act of 1885. The possession of the Commission is the possession of the State."

There was no obstacle in the way to prevent the alleged owner of this property from commencing suit against the Forest Commission at once to test the title of the State to

the lands in question, and to determine the regularity of all proceedings.

4. The owners and parties interested could have commenced suit at once to remove a cloud from the title. The statute provides that all conveyances that had been recorded for two years and all outstanding certificates that had remained in force for two years after the last day allowed by law to redeem, should, six months after the law took effect, be conclusive evidence of regularity, and that all other conveyances should be conclusive evidence of regularity after the expiration of two years from the date of recording, and all other certificates conclusive evidence four years from and after the date of issuing such certificates. The owner or occupant is allowed two years after the date of sale to redeem. Laws 1855, chap. 427, § 50.) As to all cases where the certificate had been issued for four years or the conveyance recorded for two years at the time the law went into effect, an action could have been commenced at once to vacate the certificate or deed as a cloud upon the title. As to all other cases where it appeared that the Comptroller intended to execute a conveyance, an equitable action could be maintained to prevent a cloud upon the title. The Comptroller's intention would be indicated by his advertising for redemption.

Sanders v. Village of Yonkers, 63 N. Y. 489.

Clark v. Davenport, as Comp., 95 N. Y. 477. (In this case the State was the purchaser.)

Hagner v. Hall, 10 App. Div. 581.

Sanders v. Downs, 141 N. Y. 424.

How, then, was the owner deprived of any rights or remedies? He could have appeared before the board of supervisors. He could have redeemed. He could have sued the

Forest Commission in ejectment. He could have brought suit against the Comptroller to cancel the tax sale and conveyance. He could have sued to remove a cloud from his title.

The best that can be said of the grantors of the plaintiff in error is that they have slept on their rights, if any they have had; they have neglected their remedy, and having had the opportunity to have their grievances remedied, and waited until the bar of the statute has fallen, and having stood by and seen the State maintain these lands, and incur the burdens thereof, it seems the plaintiff in error can urge no just complaint against the operation of the law which makes secure the title of the State, a purchaser at the tax sale.

At the time of the pretended sale to the plaintiff in error, neither the owner nor his representatives had any remaining interest in the land. The time for them to take action had expired.

The statutes of the State relating to cancellation by the Comptroller of tax sales were enacted for the benefit of the purchaser. If the sale is invalid, the plainest principles of justice would require that the sale should be canceled by the Comptroller and the money refunded to the purchaser. The owner must pursue another remedy.

People ex rel. Wright v. Chapin, 104 N. Y. 369.

People ex rel. Ostrander v. Chapin, 105 N. Y. 309.

Ostrander v. Darling, 127 N. Y. 70.

People ex rel. Hamilton Park v. Wemple, 139 N. Y. 240.

People ex rel. Witte v. Roberts, 144 N. Y. 234.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

Although it has been suggested by the Court of Appeals that the owner might apply for cancellation, upon more mature consideration it has been determined by that court that the owner should commence a direct action where the conflicting claims of all parties interested can be determined by judicial decree.

The owner has, however, ample protection. He can pay his taxes at the time and in the manner required by law; he can make complaint to the assessors upon grievance day; he is permitted to appear before the supervisors; he is allowed to redeem; if an action is commenced to evict him, he may set forth invalidity of the sale; he is authorized to commence suit by way of ejectment against the Forest Commission; he can sue the Comptroller to vacate the sale and conveyance; he is deprived of no substantial right. But if his action is based upon irregularities he must bring his action within four years after the certificate is issued and two years after the conveyance is recorded.

By the decision in People v. Turner, 117 N. Y. 227, and People v. Turner, 145 id., and other cases, holding that chapter 448, Laws 1885, considered as an act of limitation, afforded the landowner a reasonable opportunity to enforce his rights, the Court of Appeals of New York has established a rule of property in the State of New York which is binding on the United States courts. After such a settled course of decisions upon the act of limitation under consideration, a contrary decision by this court would present a conflict between the State courts and those of the United States productive of incalculable mischief. Many conveyances of land have been made and large sums of money paid therefor and purchasers have entered into possession and made extensive, valuable improvements thereon upon the strength of these decisions. A con-

trary decision by the United States Supreme Court would resurrect thousands of dead claims. The United States courts will adopt the State decisions because they settle the law applicable to the case, and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the State, when applied to the title of lands.

Geekie v. Kirby Carpenter Co., 106 U. S. 385.

Jackson v. Chew, 12 Wheat. 166, 167.

Barret v. Holmes, 102 U. S. 655.

Beauregard v. New Orleans, 18 How. 502.

Suydam v. Williamson, 24 How. 427.

Nichols v. Levy, 5 Wall. 433.

Williams v. Kirtland, 13 Wall. 306.

Sanger v. Nightingale, 122 U. S. 184.

Green v. Neal, 6 Pet. 291.

Harpending v. Dutch Church, 16 Pet. 455.

Porterfield v. Clark, 2 How. 76.

Elmendorf v. Taylor, 10 Wheat. 152.

Bank of Hamilton v. Dudley, 2 Pet. 492.

United States v. Morrison, 4 Pet. 124.

Gaines v. Dunn, 14 Pet. 322.

Bailey v. Magwire, 22 Wall. 215.

IV.

The land in suit having been in the actual possession of the Forest Commission, under a claim of title adverse to the plaintiff's grantor, Frank E. Smith, and his grantors, from 1885, the grants to said Smith, and from him to the plaintiff, were void for champerty.

"Every grant of land shall be absolutely void if at the time of the delivery thereof such land shall be in the actual possession of a person claiming under a title adverse to that of the grantor." (§ 147, art. 2, chap. 1, pt. 2, Revised Statutes.)

Upon the trial of the case "defendant also gave evidence tending to prove that all of the lands described in the complaint were in the actual possession of the Forest Commission of the State of New York from 1885 up to the time of the commencement of this action, and that the deeds to the plaintiff were made and executed and delivered at times when the grantor was out of possession of said premises." (Page 20.)

In addition to this, we have the affirmative decision of the highest court in the State that by virtue of the purchase by the State of the lands upon a tax sale, and by the act creating the Forest Preserve (Chap. 453, Laws 1885), the State was put in the actual possession of the land in question, which is a part of the Forest Preserve.

"That title, by force of the provisions of the act of 1885, became unquestionable upon the expiration of the six months after it went into effect. While we think the people were not bound to take any steps towards actual possession, after the conveyance to them of the land, any doubt upon the subject would seem to be eliminated by virtue of the provisions of the act which created the Forest Commission and placed the Forest Preserve, within which are the lands in

question, in the care, control and supervision of the Commission. The constructive possession which the State had acquired, I think, was made an actual possession by the powers and duties devolved upon the Forest Commission as its representative."

People v. Turner, 145 N. Y. 461.
People ex rel. v. Campbell, 152 N. Y. 51.

It is apparent that the primary object of the incorporation of the plaintiff in error was to buy up a title adverse to that of the State of New York, and then to bring action for the purpose of disputing the State's title. The Champerty Act was passed for the express purpose of preventing proceedings of this character.

Crary v. Goodman, 22 N. Y. 176.
Sands v. Hughes, 53 N. Y. 287.

In the case of Crary v. Goodman, supra, the court says, at page 176: "The Champerty Act is not, like the Statute of Limitations, a mere statute of repose. It was not intended to prescribe a limit to controversies, but simply to prevent the transfer of disputed titles. It did not attempt to determine the disputes, but only to compel their settlement between the original parties."

In the case of Sands v. Hughes, supra, the court says, in drawing a distinction between the statute relating to limitations of actions and champerty, at page 296: "The validity of the title set up by the party in possession is no more at issue in the one case than in the other; the very object of the statute is to prevent the party out of possession from transferring his right to litigate that claim."

"Where a tenant for life has executed a conveyance purporting to be a grant of the fee, and the grantee is in pos-

session, claiming a fee under the grant, after the death of his grantor, this is a possession under claim of title adverse to that of the reversioner or remainderman within the meaning of the Champerty Act (1 R. S. 739, § 147), and a conveyance by the latter is void under said act."

Christie et al. v. Gage et al., 71 N. Y. 189.

The People of the State of New York are in possession, claiming under a *specific title*, and the plaintiff is in no position to assail that title. The statute requires that the party in possession shall claim under a title. The plaintiff in error cannot assail the title of the State, for the reason that the plaintiff's grant is void, being in contravention of the Champerty Laws of the State. The point is, that at the time this corporation was organized, and obtained the grant from Smith, the lands granted were in the actual possession of the State, claiming under a title adverse to Smith and his grantors. As was said in Crary v. Goodman, supra: "The title, and not the possession, was the thing prominently in view, and this led to the more specific language *claiming under a title.* Nothing can satisfy the language of the latter act but the existence of some specific title under which the party claims. This title may be *good* or *bad;* but there must be at least a color of title opposed to the title of the grantor in the deed."

Crary v. Goodman, 22 N. Y. 176.

The proposition is clearly stated in Pearce v. Moore, 114 N. Y. 259. This was an action brought under the provisions of sections 1638 and 1639 of the Code of Civil Procedure to compel the determination of a claim made by the defendant to real estate in the possession of the plaintiff. It appeared from the evidence given upon the trial that the plaintiffs

were in possession, having obtained a quitclaim deed of the property from one Augustus Paul; and that Paul had derived his title from the Comptroller of the State. It further appeared that the defendant in the action produced a perfect paper title to lands back to the People of the State; but that the defendant's deed was obtained while the plaintiff was in possession claiming under the deed given by Paul. The court, quoting the statute, held that the deed to the defendant was void. It was urged upon the part of the defendant, upon the trial of the case, that the Comptroller's deeds to Paul were invalid. The court held that this was of no importance, saying: "It was wholly immaterial, therefore, whether the Comptroller's deeds to Paul were valid or void. As against the defendant, the plaintiffs were entitled to the possession of the land, and as against the plaintiff's deeds defendant's deed was void and the proof failed to establish a title in her. * * * The defendant's deed was absolutely void, and if, as it is claimed, there were such defects in the proceedings to sell the land for taxes as to render void the Comptroller's deed to Paul, the title to the land was still in defendant's remote grantor, and upon that title must be founded all proceedings to recover possession of the land from the plaintiffs."

Pearce v. Moore, 114 N. Y. 259, 260.

It would, therefore, appear that the individuals who organized this foreign corporation for the express purpose of securing a title to the lands in possession of the State under a title adverse to Smith and his grantors, have secured nothing better than a void grant, and a conveyance expressly prohibited by the Champerty Laws of the State of New York. The plaintiff in error has no title to the lands described in the complaint, and cannot maintain this action. Neither Smith, nor the corporation which he organized for the purpose of bringing this suit, have any standing in court, for the

reason that the statute provides that "every grant of land shall be absolutely void if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantors."

1 R. S. (2d ed.), p. 732, § 147.

The defendant, upon the trial of the case, gave evidence that the lands described in the complaint were in the actual possession of the Forest Commission; the possession of the Commission is the possession of the State; this is true not only as a matter of fact, but also as a matter of law. The State claims under a title adverse to the plaintiff in error and its grantors.

People v. Turner, 145 N. Y. 461.
People ex rel. v. Campbell, 152 N. Y. 51.

The promise and covenant to convey the title to the lands in question resulting in the deed to Smith, and from him to the plaintiff, were offensive to section 130 of the Penal Code, in that for a year prior to such promise and covenant, they had not been in possession or taken rents and profits of such lands, and such promises and covenants were misdemeanors, and such criminal acts were important to convey the lands.

"A person who buys or sells, or in any manner procures, or takes or makes any covenant or promise to convey any right or title, real or pretended, to any lands or tenements, unless the grantor thereof, or the person making such covenant or promise, has been in possession, or he and those by whom he claims have been in possession of the same or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such covenant or promise made, is guilty of a misdemeanor."

§ 130, Penal Code.

V.

There is no jurisdiction in the United States Circuit Court to take cognizance of this case.

It is evident that the organization of the plaintiff corporation, and the transfer of this real estate to the corporation, was a mere device to give jurisdiction to the United States Circuit Court, and was a fraud upon that court.

On December 21, 1894, Weed, Turner, Riley, Marsh and Ostrander claimed to have an interest in and title to certain lands in Township 24, Franklin county, N. Y. On December 21st all of them deeded their property to Frank E. Smith, pursuant to an understanding that he would organize a corporation with such land as capital, and return the property to them in the form of stock. He organized the plaintiff, as their trustee, in the State of New Jersey, and admits that such organization in New Jersey had for its purpose the bringing of this suit. The suit was brought immediately afterward, and it does not appear that the corporation ever did anything else. It is plain that the first purpose the corporation undertook to execute was the recovery of the real estate described in the complaint. The plaintiff could have sued in the State courts for the recovery of the premises. But the State courts had decided that the provisions of chapter 448, Laws 1885, were constitutional and valid, and in order to get a construction of this act more favorable to this plaintiff and its stockholders than that made by courts of New York, the alleged owners of this real estate organized the Saranac Land and Timber Company as a New Jersey corporation.

Section 5, chapter 137, United States Statutes, 1875 (18 U. S. Stat. at Large, p. 472), provides: "That if, in any suit

commenced in a Circuit Court * * * it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought * * * that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court or that the parties to said suit have been improperly * * * made * * * for the purpose of creating a case cognizable * * * under this act, the said court shall proceed no further therein." * * *

If the court is satisfied from the facts of this case that the suit does not involve really a dispute and controversy between citizens of different States, then the case comes easily within the lines of the decisions of the United States Supreme Court.

Lehigh Min. & Man. Co. v. Kelly,
160 U. S. 330.

That was a case where a Virginia corporation claimed to own lands in Virginia, and for the purpose of maintaining a suit in the Circuit Court of the United States, organized the Lehigh Min. & Man. Co. in Pennsylvania.

The stockholders of the one corporation organized the other corporation, and the Virginia corporation conveyed its title without valuable consideration to the Pennsylvania corporation. The stockholders in both corporations were the same. Here the stockholders in the New Jersey corporation are the same, except two shares, as the owners of the real estate in the State of New York.

It is unnecessary to point out further similarities between these actions. The Lehigh case contains a thorough discussion of all the cases by a majority and also a minority of the court, bearing on the construction of the statute above cited. (§ 5, chap. 137, U. S. Stat. 1875.)

The court says, page 337: "We cannot shut our eyes to the fact that there exists what should be deemed an *equivalent* to such agreement, namely, the right and power of those who are stockholders of each corporation to compel the one holding the legal title to convey, without valuable consideration, such title to the other corporation." And again, at page 342: "As we have said, that corporation may be required by those who are stockholders of its grantor and who are its own stockholders at any time and without receiving any consideration whatever, to place the title where it was when the plan was formed to wrest the judicial determination of the present controversy from the courts in the State in which the land lies." Between this state of facts and that of the case at bar there is in principle no difference. The fact that one or two shares are held by other individuals, such shares being necessarily disposed of to make a corporation, does not change the case. The courts, in the pursuit of justice, cannot be dissuaged by trifles. "De minimis non curat lex."

Even the dissenters in the court in the Lehigh case admit, if the transaction by which the lands were conveyed involved a trust, that there would be no question but that the purpose was to make a case. There was then an agreement to reconvey these lands to the owners in the State of New York by virtue of the trust which Smith swears existed.

The presumption is that the cause is without the jurisdiction of the court, unless the record shows the contrary.

Lehigh Man. & Min. Co. v. Kelly,
160 U. S. 337.
Grace v. Am. Cen. Ins. Co., 109 U.
S. 255.

The plaintiff seeks to avoid the operation of chapter 137, United States Statutes 1875, against it by the claim that

Weed, Smith and Conway are now stockholders of the plaintiff. The evidence is that the cestui que trust of Smith on the organization were Smith M. Weed, Riley, Turner, Ostrander and Mrs. Marsh, and that Smith issued the stock to them.

The judgment of the United States Circuit Court should be affirmed, and the writ of error dismissed.

J. C. DAVIES,
Attorney-General, Albany, N. Y.

THEODORE E. HANCOCK,
Counsel for Defendant in Error.

SARANAC LAND AND TIMBER COMPANY *v.* COMPTROLLER OF NEW YORK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 94. Argued December 21, 22, 1899. — Decided April 9, 1900.

Turner v. *New York*, 168 U. S. 90, is affirmed and followed to the point that "the statute of New York of 1885, c. 448, providing that deeds from the comptroller of the State of lands in the forest preserve, sold for nonpayment of taxes, shall, after having been recorded for two years, and in any action brought more than six months after the act takes effect, be conclusive evidence that there was no irregularity in the assessment of the taxes, is a statute of limitations, and does not deprive the former owner of such lands of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States," and is held to be decisive.

THIS is an action of ejectment brought to recover a tract of 7500 acres of forest land, known as the northwest quarter of township 24, Great Tract One, Macomb's Purchase, situated in Franklin County, in the Northern District of the State of New York.

The plaintiff deraigned title by various mesne conveyances from one Daniel McCormick, who became the grantee of the State of New York in 1798. The defendant claims through deeds executed to the State of New York in pursuance of sales for taxes.

The defendant also set up as a defence a six months' statute of limitations contained in chapter 448 of a law enacted in 1885 —certain statutes against champerty—the illegal organization of the plaintiff in error, and a former adjudication made on an application to cancel one of the tax sales under which the State claimed title.

The first sale upon which the title of the State is based was made in 1877 for unpaid taxes of 1866 to 1877, inclusive. A certificate was issued dated October 18, 1877, showing a sale to the State of the whole of the northwest quarter for the sum of $2756.40, and subsequently a deed in the usual form, and dated

Statement of the Case.

June 9, 1881, which was recorded in Franklin County clerk's office June 8, 1882.

The subsequent sales were made respectively in 1881 for the unpaid taxes of 1871 to 1876; in 1885 for those of 1877 to 1879; in 1890 for those of 1881 to 1885. At all of the sales except the first one the property was treated as already state property, and struck off to the State without giving opportunity for bids. Certificates and deeds were duly issued to the State in pursuance of the sale of 1881 and 1885 in due form, and duly recorded in the clerk's office of the proper county. A certificate alone was issued in pursuance of the sale of 1890.

The taxes for the years 1866 and 1867 were assessed against the whole quarter as one parcel. In the years 1868, 1869 and 1870 the whole quarter was not assessed, and so much of it as was assessed was placed upon the rolls in two parcels, and described as follows:

"Township 24, Great Tract One, Macomb's Purchase; N.W. ¼, excepting 1000 acres, lying in N.W. corner; also 1215 acres which is water, leaving 5285 acres.

"Macomb's Purchase, Great Tract One, township 24, 1000 acres, lying in the northwest corner of northwest quarter."

There was evidence tending to show that on the tract in controversy there were bodies of water, but no part of them was within the parcel of 1000 acres laid out in a square form in the northwest corner.

In December, 1894, the defendant caused a notice to be published once a week for three successive weeks in a newspaper published in Franklin County, of which the following is a copy:

"To whom it may concern:

"Notice is hereby given that the following is the list of wild, vacant forest lands located in the county of Franklin to which the State holds title, and that from and after three weeks from the 22d day of December, 1894, possession thereof will be deemed to be in the comptroller of this State, pursuant to the provisions of section 13 of chapter 711, Laws of 1893.

"William J. Morgan,
"Deputy Comptroller."

The list attached to this notice contained the land in question.

When the testimony in the case was closed the counsel for each of the respective parties, with the approval of the court, admitted that there was no question of fact in the case to be submitted to the jury; that the issues depended upon the construction that the court should give to the law; and thereupon the jury was discharged, and a written stipulation waiving a jury trial was signed by the attorneys of record for the respective parties and filed with the clerk.

The plaintiff requested the court to rule on certain propositions of law which were based on the assumption of the sale of the tract in one parcel for the aggregate unpaid taxes for several years, and claiming the following as jurisdictional defects in the sale and not cured or validated by chapter 448 of the Laws of 1885, or chapter 711 of the Laws of 1893: The sale of the whole tract for taxes which were assessed against separate and distinct parcels of it; such sale when during one or more of the years a part of the tract was not assessed; such sale when some of the taxes were assessed against the whole tract and others against a part only; insufficiency of the description to identify and distinguish the parcel sold; that at the sale of 1881 the comptroller treated the property as that of the State, and struck it off to the State without giving opportunity for other bids; and that chapter 448 of the Laws of 1885 was unconstitutional and void, and repugnant to the Fourteenth Amendment of the Constitution of the United States.

These propositions of law the court refused to affirm, and the court's action is assigned as error.

It is also urged that it was error to admit in evidence over the objection of the plaintiff the deed from the State made on the sale of 1881 conveying to the State two parcels of land in the northwest quarter of township 24 by the following description:

"Macomb's Purchase, Great Tract One, township 24, northwest quarter, 5285 acres, more or less, being all that remains of the said northwest quarter after excepting therefrom 1000 acres in the northwest corner thereof, and 1215 acres covered by water; 1000 acres in the northwest corner of the northwest quarter."

Also in receiving in evidence the certificate of sale as sued on the sale of 1890, because it was not in evidence of a legal title.

The assignments of error may, as is said in the brief of plaintiff in error, be reduced in a general way to two—

"First. Is chapter 448 of the Laws of New York of 1885 a valid and constitutional law when set up by the State in its own favor?

"Second. Were the defects shown to exist in the tax sales or either of them of such nature as to be beyond the reach of that law if valid, accepting the construction which has been put upon it by the New York court?"

The act referred to is inserted in the margin.[1] The Circuit Court found in favor of the State, basing its decision upon the constitutionality of chapter 448, following *Turner* v. *New York*, 168 U. S. 90, and holding also the law to be curative of the defects urged against the validity of the tax sales. 83 Fed. Rep. 436. The complaint was filed January 25, 1895. The plaintiff sued out this writ of error.

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[1] Laws 1885, chapter 448.

An Act to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled, "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

SEC. 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled, "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller, and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws

Mr. Frank E. Smith for plaintiff in error. *Mr. Thomas F. Conway* was on his brief.

Mr. Theodore E. Hancock for defendant in error. *Mr. John C. Davies* was on the brief.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

If chapter 448 is constitutional, its limitation attached some years before this action was commenced. It was held constitutional by this court in *Turner* v. *New York*, 168 U. S. 90. The contention now is, however, that our conclusion depended upon reasoning not applicable to the case at bar. It is said that to the validity of a statute of limitations a remedy precedent to and during the period of limitation must exist, and that a remedy did exist we assumed was decided by the state court as a state question, and that on a writ of error to its judgment we were bound by the ruling, and for that reason affirmed the judgment. But the pending case being on error to a United

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directing or requiring the same, or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based shall be subject to cancellation, as now provided by law, on a direct application to the comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

Sec. 2. The provisions of this act are hereby made applicable only to the following counties, namely: Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

States court, we not only may, but must, exercise an independent judgment—decide for ourselves, not follow the state court, whether a remedy existed.

But was the conclusion in the *Turner case* as dependent as contended? The question is best answered by the case itself.

The action was brought in the state court, and was replevin for logs cut upon wild forest lands. The State claimed title through sales for delinquent taxes and deeds executed in pursuance of them. The defendant attacked the deeds, alleging the invalidity of the taxes for 1867 and 1870, and offered evidence to show that the oath of the assessors to the assessment roll of 1867 was taken on August 10, instead of on the third Tuesday of August; and that the assessors omitted to meet on the third Tuesday to review the assessment for that year.

The State objected to the evidence as immaterial because the comptroller's deed was made conclusive evidence of those matters by the statute of the State of 1885, c. 448—the statute now in controversy. To the objection it was replied that the statute infringed the first section of the Fourteenth Amendment to the Constitution of the United States. The State's objection, however, was sustained, and judgment was directed and entered for the State, which was affirmed by the Court of Appeals, 145 N. Y. 451.

Mr. Justice Gray delivered the opinion of this court. He stated the law of 1885 establishing a forest preserve and the creation of a forest commission and its duties, and that at the date of the passage of the statute the time for redemption from tax sales was two years. He then stated the enactment and provisions of the law whose constitutionality was attacked, the time of the tax sales, the time for redemption and its expiration, the period the comptroller's deeds were on record and the time that they became conclusive, and said:

"The statute, according to its principal intent and effect, and as construed by the Court of Appeals of the State, was a statute of limitations. *People* v. *Turner*, 117 N. Y. 227; *Same* v. *Same*, 145 N. Y. 451. It is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into con-

sideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect. *Terry* v. *Anderson*, 95 U. S. 628, 632, 633; *In re Brown*, 135 U. S. 701, 705–707.

"The statute now in question relates to lands sold and conveyed to the State for non-payment of taxes; it applies to those cases only in which the conveyance has been of record for two years in the office where all conveyances of lands within the county are recorded, and it does not bar any action begun within six months after its passage. Independently of the consideration that before the passage of the statute the plaintiff had had eight years since the sale and three years since the recording of the deed, during which he might have asserted his title, this court concurs with the highest court of the State in the opinion that the limitation of six months, as applied to a case of this kind, is not repugnant to any provision of the Constitution of the United States.

"It was argued in behalf of the plaintiff in error that the statute was unconstitutional, because it did not allow him any opportunity to assert his rights even within six months after its passage. But the statute did not take away any right of action which he had before its passage, but merely limited the time within which he might assert such a right. Within the six months he had every remedy which he would have had before the passage of the statute. If he had no remedy before, the statute took none away. From the judgments of the Court of Appeals in the case at bar, and in the subsequent case of *People* v. *Roberts*, 151 N. Y. 540, there would appear to have been some difference of opinion in that court upon the question whether his proper remedy was by direct application to the comptroller to cancel the sale or by action of ejectment against the comptroller or the forest commissioners. But as that court has uniformly held that he had a remedy, it is not for us to determine what that remedy was under the local constitution and laws."

The decision establishes the following propositions:

1. That statutes of limitations are within the constitutional power of the legislature of a State to enact.

2. That the limitation of six months was not unreasonable.

3. That the statute took away no remedy which the landowner had before its passage.

4. That the state court held he had a remedy, although there was difference of opinion whether it was by direct application to the comptroller to cancel the sales or by action of ejectment against the comptroller or forest commissioners.

5. That as the state courts decided he had a remedy it was not for us to determine what that remedy was under the local constitution and laws — that is, whether it was either a direct application to the comptroller or by action of ejectment.

What, then, did this court assume, that it did not decide or ought now to decide? Counsel for plaintiff in error say that —

"The *Turner case* established the sufficiency of the time allowed by the law now in question, but it treated the existence of a court competent to try the disputed rights and of a person liable to be sued for that purpose as questions of state law, and foreclosed by the judgment of the state court. These things ought now to be decided and not assumed."

The case, however, as we have seen, was not so limited. It decided more than that the time allowed by the statute was reasonable and sufficient. It also decided that the statute took away no remedy the landowner had before its passage, and that the law of the State gave him a remedy. What it precisely was — which of the three enumerated ones it was — was not decided. Not, however, because of the assumption of anything, but because it was not demanded. And why? The question presented was the constitutionality of the statute. That depended upon the existence of a remedy in the landowner during the period of its limitation, and whether a remedy existed what better evidence or authority could there be than the decisions of the courts interpreting the laws of the State? To accept them as such was not to assume anything without deciding it. It was to ascertain a necessary element of decision, and then exercising decision. This was our duty then and it is our duty now, and the fact that the case comes for review from the Circuit Court of the United States neither enforces nor justifies different considerations. If a precedent or coincident remedy is neces-

sary to the constitutional validity of a statute of limitations, the existence of such remedy is necessary to be decided, and it depends upon the same considerations, and must be upon the same examination, no matter in what court it may be presented or may come.

The reasoning of the *Turner case* was therefore complete, and we think it is decisive against the contention of the plaintiff in error. The sufficiency of the remedies enumerated was not contested. It is not contested now. The existence of remedies is denied, but to the reasoning which attempts to support the denial we reply by repeating what we said in the *Turner case* — that as the New York Court of Appeals has uniformly held that the landowner had a remedy, "it is not for us to determine what that remedy was under the local constitution and laws."

The defects which plaintiff in error claims to have been in the assessments and to have been jurisdictional are stated as follows:

"1. The sale of the whole tract of land in question for the aggregate unpaid taxes of several years when, during one or more of those years, a part of the tract sold was not assessed or taxed at all.

"2. The sale as one tract of two or more parcels separately assessed.

"3. The assessment of taxes by a description so uncertain as not to identify the parcel of land taxed.

"4. Treating the land on the sale as already the property of the State, and denying opportunity for competitive bidding."

The first two are treated by counsel as similar and dependent upon the same grounds of objection. The specification of those grounds is that at the sale of 1877 the whole quarter, containing 7500 acres, was sold as one parcel for the aggregate unpaid taxes of 1866–1870 inclusive, amounting with interest and costs to $2756.40, but that it was not assessed as a whole except for the years 1866 and 1867; that for the years 1868, 1869 and 1870 it was assessed in two parcels; (1) the northwest quarter of township 24, "excepting 1000 acres lying in the northwest corner; also 1315 acres which is water;" and (2) "1000 acres lying in the northwest corner of the northwest quarter." And that

1215 acres was not assessed at all for those years. The plaintiff in error, however, does not show that it was in any way injured by the manner of selling. Its counsel supposes a possible severalty of ownership of the different parcels, and claims a cause of action from an injury which might have resulted to some one else. "We take it to be settled law," counsel say, "that the constitutionality of a statute is to be tested not so much by what *is done* as what *may be done* under it. . . . The present record is silent as to the actual ownership of the different parcels of the quarter in question during the years 1866–1870, but plainly they might have been the subject of separate ownership." And counsel proceeds to show how a separate owner, if he had existed, would have been embarrassed in his right of redemption by the necessity of paying some other person's taxes besides his own, and of which he had not been notified during the pendency of the tax proceedings.

We are not concerned with what might have been, but only with what was. The plaintiff in error now sues as owner of the whole tract, and if there was a several ownership of it, or of parts of it, such ownership should have been shown if anything can be claimed from it. We may not suppose it from this record. It is manifest that the manner of sale could do no injury to the owner of the whole tract. Its separation in parcels on the assessment roll would be artificial and mere description. It would not affect its value, would not require the owner to pay some one's else taxes, would not make him pay more than was justly due from him either before a sale or after a sale if he then desired to exercise the right of redemption.

But even if we should suppose a several ownership of the lands at the time of the assessment or sale, we do not think that the defects in the latter were jurisdictional, and certainly of all other defects the law of 1885 is not curative only—it is one of limitation. It matters not, therefore, what the rights of any predecessor of the plaintiff might have been if seasonably asserted. They were not seasonably asserted, and they are, therefore, now precluded.

The law is like any other statute of limitations. It is not

affected by what the rights of plaintiff in error were. Whatever they were their remedy is gone, and the title and possession of the State, whatever may have been the defects in the proceedings of which they are the consummation, cannot now be disturbed. This was the ruling in *Marsh* v. *Ne-Ha-Sa-Ne Park Association*, 25 App. Div. 34, where the cases were reviewed, and we think correctly interpreted.

In *People* v. *Turner*, 117 N. Y. 227, the remedies of the landowner before and after a sale were considered, and the law defined as one of limitation. The court said: "Considered as an act of limitation, the only question in relation thereto is whether such limitation is just and gives the claimant a reasonable opportunity to enforce his rights. (See authorities, *supra.*) Under all the circumstances of the case it cannot, we think, be said, as a question of law, that the time afforded is unreasonable. Considered as establishing a rule of evidence, the only question for examination is whether property is necessarily taken without due process of law."

That case seems to have been qualified somewhat by *Joslyn* v. *Rockwell*, 128 N. Y. 334, where it was decided that the law was not conclusive against jurisdictional defects. But *People* v. *Turner* was reaffirmed in 145 N. Y 451. If the cases are in conflict the latter must prevail, but assuming their reconciliation to be in the character of the defects passed on, they are equally authoritative against plaintiff in error.

In *Joslyn* v. *Rockwell* two defects were said to be jurisdictional: The payment of taxes and the occupation of the lands. Of the latter it was said: "The act of 1885 (chap. 448) is one, by its title, relating 'to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes.' It is provided that occupied lands are not the lands of non-residents. 1 Rev. Stat. 389, § 3. And where lands of a non-resident of a county are occupied by a resident of the town an assessment to the owner in the 'non-resident' part of the roll is illegal, and the lands should be assessed to the resident occupant. *People* v. *Wemple, Comptroller*, 117 N. Y. 77. If the lands were occupied the act of 1885 would not apply." In the case at bar there is no such fact to preclude the application of the law.

Opinion of the Court.

In the case of *Meigs* v. *Roberts, Comptroller*, recently decided by the Court of Appeals of New York, *Joslyn* v. *Rockwell*, has been explained and limited, and *People* v. *Turner* again affirmed.

The action was ejectment, and the plaintiff Meigs traced his title by a chain of conveyances from an original grant by the State in 1798. The defendant justified his possession under deeds to the State in pursuance of sales for taxes. One of them was assailed on account of an alleged defect in the notice of redemption published by the comptroller. The defendant pleaded that the action was not brought within the time prescribed by the provision of chapter 448 of the Laws of 1885 and subsequent laws. The trial court dismissed the complaint on the ground that the land was in the occupation of the State, and suit could not be maintained against it without its consent. An appeal having been taken, the Appellate Division reversed the judgment and granted a new trial, holding that the action could be maintained, but also holding that the notice of redemption of the tax sale of 1881 was fatally defective, and that the deed made in pursuance of the sale did not pass title, and that the defect was not cured by the provisions of chapter 148, (subsequently reënacted in part in 1891 and 1893,) which makes the conveyance of the comptroller upon tax sales, after the two years from its record in the county in which the lands are situated, conclusive evidence of the regularity of the proceedings in which conveyance was made.

The case was taken to the Court of Appeals, which reversed the Appellate Division.

The court said:

"We do not find it necessary to pass upon many of the questions which have been elaborately argued before us, or even the one upon which the decision of the trial court proceeded. We are of opinion that the lapse of time between the record of the conveyance of 1881 and the commencement of this action barred the right to the plaintiff to maintain it, even assuming the other questions in the case should be resolved in his favor. The learned Appellate Division held that the failure to publish a proper redemption notice was jurisdictional as to the subsequent conveyance of 1884, and, hence, not cured by chapter 448 of the laws of 1885, and cited *Ensign* v. *Barse*, 107 N. Y. 329, and *Joslyn*

v. *Rockwell*, 128 N. Y. 334, as authorities for that proposition. We think the learned court took too narrow a view of the statute of 1885. This statute, though in some aspects a curative law, is primarily and essentially much more; it is a statute of limitation. It was distinctly held to be such in two decisions of this court, *People* v. *Turner*, 117 N. Y. 227; *Same* v. *Same*, 145 N. Y. 459, and by the Supreme Court of the United States, *Turner* v. *New York*, 168 U. S. 90. A curative act in the ordinary sense of that term is a retrospective law, acting on past cases and existing rights. The power of the legislature to enact such laws is therefore confined within comparatively narrow limits, and they are usually passed to validate irregularities in legal proceedings, or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements. Cooley's Constitutional Limitations, p. 454. A very full enumeration of the cases in which the legislature may properly exercise this power is to be found in *Foster* v. *Foster*, 129 Mass. 559. But there may be in legal proceedings defects which are not mere informalities or irregularities, but so vital in their character as to be beyond the help of retrospective legislation; such defects are called jurisdictional. This principle does not apply to a statute of limitations, for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right. *Terry* v. *Andrews*, 95 U. S. 628; *Turner* v. *New York*, *supra*. *Ensign* v. *Barse*, *supra*, was strictly a case of a retrospective statute, for no period of time was given within which any party affected could assert his rights. The same is true of *Cromwell* v. *McLain*, 123 N. Y. 474. In *Joslyn* v. *Rockwell*, *supra*, as well as in the two cases of *People* v. *Turner*, all of which arose under the statute of 1885, there is to be found a discussion of defects which it was claimed were jurisdictional, and not cured by that act. Such discussion, however, is not to be construed as authority for the proposition that jurisdictional defects in legal proceedings which are beyond the scope of retrospective legislation will equally take a claim out of the bar of a statute of limitations. The existence of such defects was necessarily considered in the authorities cited, because the statute of 1885 in terms exempted from its operation cases where

the taxes had been paid, or where there was no legal right to assess the land on which they were laid. There is no exception, however, as to defects in notice of redemption or in their publication; on the contrary, it is expressly provided that the comptroller's deed, after the lapse of the requisite time, shall be conclusive evidence that 'all notices required by law to be given previous to the expiration of the two years allowed by law to redeem were regular and regularly given.'"

These considerations dispose also of the other objections to the assessment and sale. If further comment be needed as to the insufficiency of the description, it may be brief. It is based on the possibility of there having been more or less land than 1215 acres covered by water. But whether there were depends upon a question of fact, and what the court found we are not informed by the record. Not insisting on that, however, the evidence of the plaintiff tended to show that the area covered was 1035 acres; the evidence of the defendant tended to show that the area was 1284 acres. Even if the court found the latter, the difference between it and the assessment did not make the description insufficient. A description of land for the purposes of taxation is sufficient if it affords the means of identification and does not positively mislead the owner. Cooley on Taxation, 407; *Keely* v. *Sanders*, 99 U. S. 443.

The assessment was not of the land covered by water. That was an exception from a larger tract, and an error of a few acres in a part so completely defined by its character surely did not so impair the identity of the larger tract as to hide it from the search or knowledge of its owner, whether he was anxious or indifferent about his taxes.

The same comment can be made of the "1000 acres lying in the northwest corner of the northwest quarter" of the tract, whether we regard it as a parcel or an exception from another parcel. *Jackson* v. *Vickory*, 1 Wend. 407; *Dolan* v. *Trelevan*, 31 Wisconsin, 147; *Bowers* v. *Chambers*, 53 Mississippi, 259; *Doe ex dem. Hooper* v. *Clayton*, 81 Alabama, 391.

The other assignments of error it is not necessary to specifically notice nor the defences of champerty and the alleged illegal organization of the plaintiff in error.

Judgment affirmed.